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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted]
218

STATE OF NEBRASKA, ex rel. LOREN B. BELKER,
Appellant,

vs.

BOARD OF EDUCATIONAL LANDS AND FUNDS, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

JURISDICTIONAL STATEMENT

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INDEX

Subject Index

	Page
Jurisdictional Statement	1
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement of the Case	4
The questions are substantial	9
Appendix A (Opinions)	17
Appendix B (Statutes)	59

Cases Cited

Banks v. State, 181 Neb. 106, 147 N. W. 2d 132	10
Burnham v. Bennison, 121 Neb. 291, 236 N. W. 745	13
Farm Lake Ranch Co. v. Cumbow, 102 Neb. 288, 167 N. W. 75	10
In re Estate of Linch, 136 Neb. 705, 287 N. W. 88	13
John A. Creighton Home v. Waltman, 140 Neb. 3, 299 N. W. 261	10
Metropolitan Utilities Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N. W. 2d 626	14
State v. Kidder, 173 Neb. 130, 112 N. W. 2d 759	10
State ex rel. Ebke v. Board of Education Lands & Funds, 159 Neb. 79, 65 N. W. 2d 392	10
State of Neb. ex rel. Belker v. Board of Educational Lands & Funds, et al., 184 Neb. 621, 171 N. W. 2d 156	2, 9
State of Neb. ex rel. Belker v. Board of Educational Lands & Funds, et al. (on rehearing), 185 Neb. 270, 175 N. W. 2d 73	2, 14, 15
The First Trust Co. of Lincoln v. Exchange Bank, 126 Neb. 856, 254 N. W. 569	10

Page

The People v. Western Union Tel. Co., 70 Colo. 90, 198 P. 146 ---- 14

Constitution Cited

Art. IV, Sec. 2, Constitution of the U. S. ---- 4, 6
Amendment 14, Sec. 1, Constitution of the U. S. ---- 4, 6
Art. V, Sec. 1, Constitution of Nebraska ---- 14
Art. V, Sec. 2, Constitution of Nebraska ---- 3, 7, 8, 9, 13
Art. V, Sec. 5, Constitution of Nebraska ---- 15

Statutes Cited

Title 28, U. S. C., Section 1257(2) ---- 3
Section 72-208, R. R. S. Neb. 1943 ---- 2, 4, 6
Section 72-257, R. R. S. Neb. 1943 (Cum. Supp. 1967) ---- 2, 4, 6
Section 72-258, R. R. S. Neb. 1943 (Cum. Supp. 1967) ---- 2, 4, 6
Section 72-258.01, R. R. S. Neb. 1943 ---- 2, 4, 6
L. B. 234, 1965 Legislative Session of Nebraska ---- 2
L. B. 704, 1967 Legislative Session of Nebraska ---- 2
L. B. 869, 1967 Legislative Session of Nebraska ---- 2

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment and opinion of the Supreme Court of Nebraska entered October 3, 1969, and from the judgment and opinion of the Supreme Court of Nebraska entered on March 10, 1970, after granting appellant a rehearing. In each instance, appellant's position was supported by four of the seven members of the Court, thereby constituting a majority. However, under the Constitution of the State of Nebraska, acts of the legislature, such as those involved herein, may not be declared in violation of the Constitution without five affirmative votes of the Court. Appellant submits this

statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska is reported in 184 Neb. 621, 171 N. W. 2d 156 (1969) and the opinion entered after granting appellant's Motion for Rehearing is reported in 185 Neb. 270, 175 N. W. 2d 73 (1970). Copies of the opinions are attached hereto as Appendix A.

JURISDICTION

The suit was instituted in the District Court of Lancaster County, Nebraska seeking to declare Sections 72-208 and 72-258.01, R. R. S. 1943 and 72-257, and 72-258, R. R. S. 1943 (Cum. Supp. 1967) void and in contravention of the Constitution of the United States and the Constitution of th State of Nebraska and to enjoin the appellees from proceeding to sell *all* school lands held in trust for and on behalf of the common schools of the State of Nebraska as directed by the Legislature of the State of Nebraska. Such directions were contained in Legislative Bill 234 enacted by the 1965 Legislature of the State of Nebraska and in Legislative Bill 704 and Legislative Bill 869 enacted by the 1967 Session of the Nebraska Legislature.

On April 17, 1968, the District Court of Lancaster County, Nebraska entered an order denying the injunctive relief sought by appellant and dismissing plaintiff's petition. After the trial court overruled the appellant's Motion for New Trial on April 26, 1968, appellant filed his Notice of Appeal on April 30, 1968, and perfected his appeal to the Supreme Court of Nebraska. The Supreme Court of Ne-

braska heard arguments on this matter in January of 1969 and thereafter rendered an opinion on October 3, 1969, in which three members of the Court affirmed the decision of the District Court, while four members dissented. However under Article V, Section 2, Constitution of Nebraska, the action of the minority members of the Court prevailed and a per curiam opinion was filed affirming the judgment of the District Court. A Motion for Rehearing was thereafter duly filed and the Court granted the Motion for Rehearing and ordered reargument. Reargument was held on the 2nd day of December, 1969. Thereafter, on the 10th day of March, 1970, the same three members of the Court reaffirmed the action of the trial court, while four members of the Court again filed dissenting opinions declaring that the acts of the Legislature were in violation of appellant's rights.

Once again, due to the requirement of the Nebraska Constitution, Article V, Section 2, five members of the Court not voting to declare the acts in violation of the Constitution, the acts of the Legislature in question were held valid. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Nebraska on May 8th, 1970. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U. S. C., Section 1257(2).

QUESTIONS PRESENTED

There are three specific questions presented by this appeal. They are as follows:

(1) Can the Legislature of Nebraska deny to the beneficiaries of the Nebraska School Land Trust the equal protection of laws otherwise granted to beneficiaries of trusts generally in the State of Nebraska, and order all of the

school lands held in trust sold without regard to the wisdom of such sale or the prudence of such action, thereby depriving the school children of Nebraska of their property?

(2) Can the Legislature of the State of Nebraska deny the State Court its inherent equity jurisdiction to supervise the administration of trusts and protect the rights of the beneficiaries?

(3) Can three members of a seven-man Supreme Court, elected on the basis of equal population per district, be given greater authority in rendering decisions than the other four remaining members of the Court representing equal districts, in violation of the one-man one-vote rule?

STATUTES INVOLVED

Article IV, Section 2 and Amendment 14; Section 1 of the Constitution of the United States, Article V, Section 2 of the Constitution of the State of Nebraska and Sections 72-208 and 72-258.01, R. R. S. 1943, 72-257, 72-258 (Cum. Supp. 1967), all as set forth in Appendix B.

STATEMENT OF THE CASE

Appellant is a citizen, resident and taxpayer of the State of Nebraska and the parent of a child of school age residing in Nebraska who was the beneficiary of the trust created for the benefit of children of school age. He brings this action on his own behalf and on behalf of all other parents and children similarly situated. Prior to filing this judicial action in the District Court of Lancaster County, Nebraska, appellant presented his petition to the Attorney-General of the State of Nebraska, who refused to file said action.

The suit concerns itself with action taken by the Legis-

lature of the State of Nebraska during its 1965 and 1967 Sessions wherein it directed the Board of Educational Lands and Funds to sell *all* of the school land held by the Board in trust for the common schools at the expiration of the leases. On December 31, 1967, there was a total of 1,622,159.53 acres held by the Board of Educational Lands and Funds. Of that total, all but 1,098 acres were under lease.

Following the Session of the Legislature in 1967 mandatorily directing that all the school land be sold as the leases expired, the board proceeded to sell certain of the lands. There were 294 leases which expired in 1968 and approximately 250 leases that would expire each year until 1975 at which time approximately one-half of the leases with a present valuation of $75 million would expire. As of January, 1965 school lands had an appraised value of $39,500,000. A reappraisal was ordered and by December, 1967, the reappraisal reflected that the school lands had a value of $70,100,000. There was $15,000,000 in the permanent school fund representing proceeds realized from sales in previous years of 1,300,000 acres of school lands. The record reflected that if the state still owned the 1,300,000 acres, the land would now have an approximate valuation of *$250,000,000.*

Most of the present school lands were under lease. Much of the land was leased by farmers and ranchers who owned lands which surround the school lands and were required to lease the school land from the state in order to have passage from one area of land owned by them to another. Certain of the land was also under lease as state parks or county fairgrounds.

The uncontradicted testimony, presented at the time of

the trial, was to the effect that the volume of sales required by the act would depress the market and would lower the value of the individual tracts. The testimony further established that the present source of available funds could not possibly support the sales when the majority of the leases expired. Appellant's expert witnesses testified further, without contradiction in the evidence, that it would *not* be a prudent or sound investment policy to sell *all* of the real estate and invest the proceeds in government bonds as required by the law. One of appellant's expert witnesses testified that his organization, a large life insurance company, was actively selling government bonds and placing more emphasis on equity investments such as real estate.

Appellant filed his suit in the District Court of Lancaster County, Nebraska seeking to declare Sections 72-208 and 72-258.01, R. R. S. 1943 and 72-257, 72-258 (Cum. Supp. 1967) void and in contravention of the Constitution of the United States and the Constitution of the State of Nebraska and to enjoin the defendants and each of them from selling all school lands held in trust for and on behalf of the common schools of the State of Nebraska.

Appellant specifically alleged in his petition that the Legislative acts denied to the beneficiaries of the trust their property without due process of law in violation of the Constitution of the United States, being Article IV, Section 2, and Amendment 14, Section 1 of the Constitution of the United States.

The trial court entered an order denying the injunctive relief sought and dismissed appellant's petition. In its formal journal entry, however, the trial court noted:

"The record casts serious doubt on the wisdom of

> the legislature in directing the sale of all school land, but upon showing that a fair market value will accrue from said sale, the Court is without power to interfere and the 'prudent man rule' is satisfied."

No specific finding was made by the trial court with regard to the contentions raised by the appellant that such statutes and questions were in violation of appellant's rights under the Constitution of the United States as raised in the pleadings.

Appeal was taken to the Supreme Court of the State of Nebraska and on October 3, 1969, after having said matter under advisement for some nine months, a per curiam opinion was filed in which the action of the District Court dismissing the petition was affirmed. The per curiam opinion noted that:

> "The judgment, under Article V, Section 2 of the Constitution of the State of Nebraska, must be affirmed."

The reason for such requirement was due to the fact that only four members of the seven-member court found the statutes in question to be in violation of the rights of the beneficiaries of the trust. Under the Nebraska Constitution, Article V, Section 2, an act of the Legislature cannot be declared void and in contravention of either the Nebraska Constitution or the Constitution of the United States without the concurrence of five members of the court. The failing majority of the Court, however, specifically pointed out that said statutes violated the law of trust prevailing in the State of Nebraska, and particularly pointed out that the trial court was in error in concluding that obtaining the best possible price pursuant to an appraisal would necessarily satisfy the "prudent man" rule. The failing majority specifically pointed out that under

the statute the trustee might be required to sell the land in a depressed market; and while obtaining fair value based upon appraisal at the particular moment, the act of the trustee might place the entire trust in jeopardy and fail to satisfy the "prudent man" rule. The failing majority pointed out that it was the duty of the trustee to exercise due care, diligence and skill in the sale of trust property so as to secure the most advantageous return possible.

Thereafter, appellant filed a motion for rehearing which motion was sustained by the Supreme Court of Nebraska and oral argument was ordered. Among other questions, appellant was requested to argue the following specific questions:

1. The significance if any of the fact that the school land trust is the creation of a federal-state compact entered into by the State of Nebraska by the Enabling Act at the time of its admission to the union.

2. The validity under the federal constitution of the provisions of Article V, Section 2 of the Constitution of the State of Nebraska requiring the concurrence of five judges in order to declare the Legislative Act unconstitutional.

Following oral argument on the rehearing, the prevailing minority again held the trial court's action correct saying that the court could determine the prudence of each transaction by examining each sale as and if an action was brought.

The failing majority again pointed out that the decision of the prevailing minority failed to recognize the trust laws of the State of Nebraska and, in effect, authorized the trustees of the school lands to act in a manner contrary and

different than other trustees and, in effect, to deny the beneficiaries of the school lands, the protection which other beneficiaries would receive under Nebraska trust law and which was contemplated when the federal-state compact was executed.

In the first decision, the failing majority consisted of three judges of the Supreme Court and one District Judge sitting by assignment. The failing majority hearing oral arguments on rehearing consisted of four Supreme Court judges. In effect then, five different judges have held the acts in question in violation of the Constitution, though all five were not present at one time.

In the opinion filed by the court after oral argument on rehearing, Spencer, J., a member of the failing majority, specifically noted that the requirement of Article V, Section 2, Constitution of Nebraska giving the right of three members of the Court to override a majority opinion with regard to legislative acts was clearly in violation of the Federal Constitution.

The Questions Are Substantial

That the 1,622,159.53 acres held by the Board of Educational Lands and Funds which were received pursuant to congressional act approved May 30, 1854, is land held in trust by said Board is without dispute. Both the prevailing minority and the failing majority each concede that the property is held in trust. A separate concurring opinion rendered by the prevailing minority in its opinion filed October 3, 1969, reported in 184 Neb. 621, 171 N. W. 2d 156 at page 162 noted:

> "School lands, income and assets are held in trust and the administration of the trust estate is governed by the rules of law applicable to trustees acting in a fiduciary capacity. . . ."

Notwithstanding the fact that the prevailing minority as well as the failing majority, recognize that the property is held in trust and must be governed by trust law, the prevailing minority has denied to the beneficiaries of the trust the equal protection of the laws granted to beneficiaries of other trusts. See further *Farm Lake Ranch Co. v. Cumbow,* 102 Neb. 288, 167 N. W. 75 (1918); *State v. Kidder,* 173 Neb. 130, 112 N. W. 2d 759 (1962); *State, ex rel. Ebke v. Board of Educational Lands and Funds,* 159 Neb. 79, 65 N. W. 2d 392 (1954).

The law in Nebraska concerning the supervision of trusts is similar to trust law found in most jurisdictions within the United States and is to the effect that a trustee is required to administer the trust estate in such manner as to at all times exercise such care and diligence in the management and control of such trust estate as would be pursued by a man of ordinary skill and prudence in the management of his own affairs. *The First Trust Co. of Lincoln v. Exchange Bank,* 126 Neb. 856, 254 N. W. 569 (1934); *John A. Creighton Home v. Waltman,* 140 Neb. 3, 299 N. W. 261 (1941) and *Banks v. State,* 181 Neb. 106, 147 N. W. 2d 132 (1966).

Under the statutes in question, introduced in part by Senator Ramey Whitney of Chappell, the losing defendant in the case of *State, ex rel. Ebke v. School Lands,* 159 Neb. 79, 65 N. W. 2d 392 (1954), *all* of the lands *must* be sold as the present leases expire. Likewise, because of the requirements of Nebraska law, the proceeds can only be invested in government securities. The net effect then is to dispose of substantial assets, appreciating in value, in order to invest the proceeds in fixed income. The only requirement in the statute is that the minimum bid must be equal to the appraised value. What is overlooked is the

fact that appraised value will depend upon what may be the real estate market situation at a particular time. In a depressed market, appraised values will be less than in a rising market. If a trustee of a private trust disposed of all of the trust property causing a depressed market, in order to purchase government bonds having no appreciation, it certainly could be maintained that such actions on the part of the trustee were not prudent and were in violation of his fiduciary duty.

Notwithstanding that fact, the Legislature has compelled the trustee to so act. Moreover, we are here dealing with lands which have one value when leased and realistically a substantially lower value when sold.

If the owner of land must lease from the trustee certain land in order to continue his farming or ranching operation, he obviously is willing to pay a higher and more reasonable rental based on fair return. On the other hand, if the land to be sold is landlocked as it is in many instances, so that only one purchaser is available, the value of the land is immediately depressed. Such is the case with regard to school lands, particularly in the western part of the state where large ranchlands exist.

Moreover, the undisputed evidence discloses that the act of the trustee in this case will of itself depress the market resulting in a lower yield. Yet, notwithstanding all of those facts, the trustee herein, to-wit, The Board of Educational Lands and Funds, is divested of the discretionary power normally granted to a trustee and is compelled to act without reason in disposing of all of the school lands and contrary to actions prohibited by law to all other trustees.

It seems reasonably clear that the Congress of the United

States intended that these school lands be protected by the trust laws then in existence. If it was the intention of the Congress of the United States to simply grant to the states the school lands to do with as they please, they certainly would not have prescribed that the same be given in trust to the states for and on behalf of the support of the common schools. Congress knew full well that they could be assured that the property would be properly administered by virtue of the fact that the law of trust became an inherent part of the compact and contract giving said land to the states.

The Legislature of the State of Nebraska in violation of that obligation has chosen to compel the trustee, against its own best judgments, to dispose of said land and thereby deny to the beneficiaries of this trust the equal protection of laws otherwise granted to all other citizens of the State of Nebraska whose property is held in trust. To suggest as the prevailing minority has, that the beneficiaries of the trusts, to-wit, the school children of Nebraska, might bring an action each time they contemplate that a particular sale of land is not in accordance with law, is to, in effect, deny due process to such beneficiaries and, in effect, deprive these beneficiaries of their property without due process of law.

If the trustees of the trust are no longer compelled to act prudently in protecting the rights of their beneficiaries, who then can be expected to take such action.

Fifteen million dollars presently in the school land fund is the result of lands sold in the eastern part of Nebraska at the turn of the century. The principal of the fund has not grown since the land was sold, the funds having to be invested in fixed government bonds. Today that land,

then worth $15 million, has an admitted value of $250 million. If the land is not returning a sufficient income, all the Legislature need do is increase the percentage of rental required by former law to be charged by the board in each case, rather than the mass selling of all the land.

Appellant does not maintain that some land cannot be sold by the board as it deems prudent. Certainly, from time to time, some lands can and should be sold. To, however, require *all* lands to be sold as the leases expire recognizing that the market will be completely destroyed with such sales solely for the purpose of permitting certain individuals to acquire such land, is in complete violation of the beneficiaries' right to the equal protection of the laws.

Moreover, the act of the Legislature has, in effect, divested the courts of its inherent equity jurisdiction to supervise the administration of trusts. That such is the law in Nebraska is clear. See *Burnham v. Bennison,* 121 Neb. 291, 236 N. W. 745 (1931); *In Re Estate of Linch,* 136 Neb. 705, 287 N. W. 88 (1939). The only question which the state court has now to determine when objections are made to a sale is whether the sale was for an amount at least equal to the minimum appraisal. If the statute is permitted to stand, the Court has been totally divested of its inherent equity jurisdiction to supervise this trust and the beneficiaries have been denied their traditional protector.

A further substantial federal question involves Article V, Section 2 of the Constitution of the State of Nebraska which requires that no act of the Legislature may be declared void without the approval of five members of the seven-member court. Article V, Section 2 of the Constitution of the State of Nebraska is in itself in violation of the Constitution of the United States and in violation of the

judicial duties imposed upon the court in upholding not only the Constitution of the United States but the Constitution of the State of Nebraska.

Section 1 of Article V of the Nebraska Constitution provides:

> "The judicial power of the state shall be vested in the Supreme Court."

In *Metropolitan Utilities District v. Merriti Beach Company*, 179 Neb. 783, 140 N. W. 2d 626 (1966) the Nebraska Supreme Court said:

> "The power to declare an act of the legislature unconstitutional is a judicial power reserved solely to the courts under the division of the powers between the legislative, executive and judicial branches of government set forth in the Nebraska Constitution."

To permit the Legislature of the State of Nebraska, by constitutional amendment, to limit the authority of the court to determine an act in violation of the Constitution of the State of Nebraska or the Constitution of the United States is to totally ignore the traditional division of power. Once a majority of the court determines that the act is in violation of the Constitution of either the State of Nebraska or the United States, it is incumbent upon the court to so declare said act in violation and to prohibit its fulfillment. To do otherwise is to permit the Legislature to deny to the court its judicial duty and to subject the court to the dictates of the Legislature. See *The People v. Western Union Telegraph Company*, 70 Colo. 90, 198 P. 146 (1921).

This impropriety is clearly pointed out by one of the members of the failing majority in his specific dissenting opinion. Spencer, J., writing in *State, ex rel. Belker v.*

Board of Educational Lands and Funds, 185 Neb. 270, 175 N. W. 2d 731 (1970) at page 283 said:

> "Additionally, I think the right of three members of this Court to override a majority opinion and state that the following sentence from Article V, Section 2, Constitution of Nebraska 'No legislative act shall be held unconstitutional except by the concurrence of five judges' is itself unconstitutional. . . . Any dilution of the judicial power shatters the fundamental principle that government is divided into three coordinate branches, legislative, executive and judicial. Any limitation upon what is rightfully a part of the judicial power destroys the republican form of government. If it is possible to require more than a majority vote, is it not also possible to require a unanimous vote to so hold as foreign and hostile to our republican form of government.
>
> "There are certain acts which even the state constitution cannot abrogate. One of these is to limit the authority of this court to exercise its sovereign and inherent power as the judicial branch of government free from the dictates of the legislature."

The final issue which is of substantial nature concerns the makeup of the court and its voting requirements. Under Article V, Section 5 of the Constitution of the State of Nebraska, justices of the court are required to be selected by districts. The section specifically requires that the Legislature shall divide the state along county lines into six compact districts of approximately *equal* population. On that basis then, the people in three of those districts represented by three of the members of the court have greater voice in determining whether the act of the Legislature is in violation of the Constitution than do the citizens of the remaining three districts. While recognizing the court need not be constituted in such a manner, it cannot be ignored that once the Constitution requires repre-

sentation on the court to be in accordance with equal population, the districts must be equally represented.

To suggest that an act of the governor may be declared in violation of the Constitution by simple majority of the court; to suggest that the act of the judiciary in sentencing a man to death can be overturned by the Supreme Court acting by a simple majority; but to require the Legislative branch of government to be granted greater insulation, is to indeed deny to the citizens the equal protection of the law.

It is, therefore, submitted that the act of the legislature compelling the sale of the school lands, affirmed by a prevailing minority of the Supreme Court of Nebraska involving trust property having a real value in excess of $100 million and which once sold can never be recovered, does present so substantial a question as to authorize this court to re-examine such action. The welfare of the school children of the State of Nebraska is dependent upon the action of this court.

Respectfully submitted,

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APPENDIX A

STATE OF NEBRASKA EX REL. LOREN B. BELKER, APPELLANT, V. BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA ET LA., APPELLEES.

— N. W. 2d —

Filed October 3, 1969. No. 37004.

Appeal from the district court for Lancaster County: Bartlett E. Boyles, Judge. Affirmed.

Ginsburg, Rosenburg, Ginsburg & Krivosha and Rodney P. Cathcart, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellees.

McGinley, Lane, Mueller & Shanahan, Maupin, Dent, Kay, Satterfield & Gatz, and Gary L. Scritsmier, for amicus curiae.

Heard before White, C. J., Boslaugh, Spencer, Smith, McCown, and Newton, JJ., and Colwell, District Judge.

Per Curiam.

This action seeks to enjoin the sale of all of the school lands held in trust for and on behalf of the common schools of Nebraska, and to declare sections 72-257 and 72-258, R. S. Supp., 1967, and 72-258.01, R. R. S. 1943 (as amended by Laws 1965, c. 435, §§ 2, 3, and 4, pp. 1386 and 1387, and Laws 1967, c. 466, §§ 10 and 11, p. 1450), void and unconstitutional.

Four judges are of the opinion that the statute is unconstitutional as challenged. Three judges are of the opinion that it is constitutional under present conditions, and refuse to consider the situation as it may appear in

1975 when approximately one-half of all school land leases will expire. Article V, section 2, Constitution of Nebraska, provides in part: "No legislative act shall be held unconstitutional except by concurrence of five judges."

The court is in agreement that the phrase "all mineral rights" in section 72-257, R. S. Supp., 1967, is declaratory of Article III, section 20, Constitution of Nebraska, and that the Legislature within constitutional limits may direct the Board but not a county treasurer to auction common school lands.

The district court dismissed the action herein. The judgment, under Article V, section 2, Constitution of Nebraska, must be affirmed.

Affirmed.

Spencer, J., joined by White, C. J., Newton, J., and Colwell, District Judge.

The real question at issue herein is whether the words "under the direction of the Legislature" grant to the Legislature the right to deprive the Board of Educational Lands and Funds of the State of Nebraska of all discretionary rights and duties of a trustee, including the responsibility to dispose of trust property on the most advantageous terms it is possible to secure.

Plaintiff is a citizen, resident, and taxpayer of the State of Nebraska and the parent of a child of school age residing with him in Nebraska who is a beneficiary of the trust created for the benefit of children of school age, and he brings this action in his own behalf and on behalf of all others similarly situated.

The petition herein had been presented to the Attorney General prior to its filing. The Attorney General denied

the request of the petitioner and refused to file said action. On December 31, 1967, there was a total of 1,622,159.53 acres owned by the Board of Educational Lands and Funds of the State of Nebraska, hereinafter referred to as Board. Of that total, 1,621,061.58 acres were under lease. Since January 1, 1968, the Board had sold some of the lands and it was stipulated that it intends to continue selling school lands as the leases expire. In connection with the school lands sold at the expiration of their leases, the sum of $11,916.99 was expended between January 1, 1968, and March 25, 1968.

There were 294 leases which expired in 1968, and approximately 250 will expire each year until 1975, at which time approximately one-half of all the leases, with a present valuation of 75 million dollars, will expire. As of January 1965, the school lands had a value of $39,500,000. By December 1967, when a reappraisal of the school lands had commenced, the value was $70,100,000. There is 15 million dollars in the permanent school fund, representing proceeds realized from sales over the years of 1,300,000 acres of school land. That 1,300,000 acres, if still owned by the state, would have an approximate valuation of 250 million dollars.

Testimony on behalf of the plaintiff that the volume of sales required by the act would depress the market and would lower the value of the individual tracts, and that the present source of available funds could not possibly support the sales when the majority of the leases expire, stands undisputed in this record. Plaintiff's expert witness testified that it would not be a prudent or a sound investment policy to sell all the real estate and to invest the proceeds in government bonds. This testimony also stands undisputed. Plaintiff's expert further testified

that his organization at the present time was actively selling government bonds and was placing more emphasis on equity investments, such as real estate.

In order to understand the questions presented herein, it is necessary to examine the historical background of and the source of title to the school lands in Nebraska. On May 30, 1854, Congress approved an act for the purpose of organizing the territories of Nebraska and Kansas. Section 16 of that act, 10 Stat. at L., p. 283, is as follows: "And be it further enacted, That when the lands in the said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same."

Nebraska became a state by virtue of an Enabling Act of Congress approved April 19, 1864. (13 Stat. at L., p. 47.) By the terms of this act, sections 16 and 36 of each township were granted to the state for the support of the common schools except in cases where sales had been made, in which event the state was granted other lands equivalent in area. Nebraska adopted a Constitution within the territory in 1866, and was admitted into the Union on March 1, 1867. By its admission, it assumed the privileges and duties of statehood, including those imposed by the Enabling Act referred to above, which included the acceptance of the lands and funds for the common schools of the state.

The Constitution of Nebraska, 1866, contained the following provision: "The principal of all funds arising from

the sale, or other disposition of lands or other property, granted or entrusted to this State for educational and religious purposes, shall forever be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations. The Legislature shall make such provisions by taxation or otherwise, as, with the income arising from the school trust funds, will secure a thorough and efficient system of common schools throughout the State; but no religious sect or sects, shall ever have any exclusive right to, or control any part of the School funds of this state."

Sections 1, 2, and 3, of Article VIII, of the Constitution of Nebraska, 1875, which amended the Constitution of 1866 with regard to school lands and funds, their use and supervision, provided as follows: "Section 1. The governor, secretary of state, treasurer, attorney-general, and commissioner of public lands and buildings shall, under the direction of the legislature, constitute a board of commissioners for the sale, leasing, and general management of all lands and funds set apart for educational purposes, and for the investment of school funds in such manner as may be prescribed by law.

"Sec. 2. All lands, money, or other property granted, or bequeathed, or in any manner conveyed to this state for educational purposes, shall be used and expended in accordance with the terms of such grant, bequest, or conveyance.

"Sec. 3. The following are hereby declared to be perpetual funds for common school purposes, of which the annual interest or income only can be appropriated, to-wit: First. Such per centum as has been, or may here-

after be granted by congress on the sale of lands in this state. Second. All moneys arising from the sale or leasing of sections number sixteen and thirty-six in each township in this state, and the lands selected, or that may be selected in lieu thereof. Third. The proceeds of all lands that have been, or may hereafter be granted to this state, where, by the terms and conditions of such grant, the same are not to be otherwise appropriated. Fourth. The net proceeds of the lands and other property and effects that may come to the state, by escheat or forfeiture, or from unclaimed dividends, or distributive shares of the estates of deceased persons. Fifth. All moneys, stocks, bonds, lands, and other property, now belonging to the common school fund."

Except for the composition of the board of commissioners, whose function is still the same, there has been no material change made with regard to school lands and funds since the Constitution of 1875.

Section 72-257, R. S. Supp., 1967, provides as follows: "All lands, now owned or hereafter acquired by the state for educational purposes, shall be sold at the expiration of the present leases. The Board of Educational Lands and Funds shall retain all mineral rights in the land sold. Prior to such sale, the land shall be appraised for sale purposes in the same manner as privately-owned land by a representative appointed by the Board of Educational Lands and Funds, and thereafter shall be sold at public sale at not less than the appraised value; Provided, that when two or more contiguous tracts within a section are under separate leases with different expiration dates the board may, if it is deemed to be in the best interest of the state, defer the sale of any tract of one hundred sixty acres or less having an earlier lease expiration date, and may offer the tract for lease for less than twelve years to

coincide with the expiring lease of the contiguous tract, in order that the contiguous lands within a section may eventually be offered for sale on the same date."

Section 72-258, R. S. Supp., 1967, provides: "Such land shall be sold, at public auction, by a representative of the Board of Educational Lands and Funds or by the county treasurer of the county in which the land is located, to the highest bidder. The appraised value for sales purposes as provided in section 72-257 shall be the starting bid price. Notice of such sale and the time and place where the same will be held shall be given by publication three consecutive weeks in some legal newspaper published in the county where the tracts of land or the lots are located or, in case no legal newspaper is published in said county, then in some legal newspaper of general circulation therein. The proof of such publication shall be made by the affidavit of the publisher, foreman or principal clerk of such newspaper or by some other person knowing about the same, and shall be filed in the office of the Board of Educational Lands and Funds; Provided, when the land consists of an undivided interest in realty, an action to partition may be maintained in the same manner as provided by law for the partition of real property among several joint owners. All notices of sale shall be posted in the office of the Board of Educational Lands and Funds. The board may arrange for such commercial advertising of land sales as it deems in the best interest of the state. Settlement shall be made by paying cash of not less than twenty percent of the purchase price at the time of sale and the balance shall be payable in cash within ninety days of the date of sale. If the person submitting the high bid for the land fails to pay the balance of the purchase price and complete the sale within ninety days his rights under the sale, including the twenty per cent down payment, shall be forfeited

by the board and a new sale shall be authorized."

Section 72-258.01, R. R. S. 1943, provides: "If such land should not be sold according to provisions of sections 72-208, 72-257, and 72-258, then it shall be offered for lease as the Board of Educational Lands and Funds shall provide for a period of six years. No such leased land shall be subsequently offered for sale until the expiration of such lease."

It is to be noted that all the school lands except mineral rights shall be sold at the expiration of their present leases, and if the land is sold at not less than the appraised value as determined by a representative appointed by the Board, the Board has no discretion as to the approval or the disapproval of the sale.

The provision of the Enabling Act making the grant, the Constitution of 1866 setting apart and pledging the principal and income from such grant, and the subsequent act admitting the state into the Union under such Constitution, constitute a contract between the state and the national government relating to such grants. See State v. Central Nebraska Public Power & Irr. Dist., 143 Neb. 153, 8 N. W. 2d 841.

The public school lands were received and are held in trust by the State of Nebraska solely for the benefit of the common schools of the State of Nebraska. The state as trustee of the lands and of the income therefrom is required to administer that trust estate under the rules of law applicable to trustees. The title of the lands is not vested in the state with all the ordinary incidents of other titles but the title thereto was granted to and vested in the state upon an express trust for the "support of common schools," with no right or power of the state to use, dis-

pose of, or alienate the lands or any part thereof, except as allowed by the Enabling Act and the Constitution. Anyone dealing with the school lands must do so with knowledge of and subject to the trust obligation of the state. See Propst v. Board of Educational Lands & Funds, 156 Neb. 226, 55 N. W. 2d 653, 346 U. S. 823, 74 S. Ct. 39, 98 L. Ed. 348.

Any statute providing for the sale of school lands that does not permit the trustees to get the highest possible price is violative of the best interest of the trust and constitutionally a violation of the duties of the trustee. The statute in question forces the sale of school lands if someone bids the price at which they have previously been appraised, regardless of the fact that it could be evident that a higher price might be secured if the sale was not confirmed.

It has been suggested that the rejection and confirmation of bids can be inferred. To answer that question we need merely to refer to the legislative debate and action on the statute in question. Senators Budd and Marsh, in support of amendments to the act, argued that the Board of Educational Lands and Funds should have the right to reject bids. Senators Adamson, Paxton, Whitney, and Wylie vigorously opposed this position. Their efforts prevailed, indicating a legislative intent that the Board be denied any right to reject or confirm bids.

It is fundamental that the intention of the Legislature may be expressed by omission as well as by inclusion. Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409; Johnson Fruit Co. v. Story, 171 Neb. 310, 106 N. W. 2d 182; Bass v. County of Saline, 171 Neb. 538, 106 N. W. 2d 860.

"It is not the province of the court to read into a statute something omitted from it by the Legislature or to discover a meaning not warranted by the legislative language. The omission of a word from an amendment of a statute must be assumed to have been intentional and for a purpose. Courts in giving effect to the amendment may not supply the omission." Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409. "To supply these defects, and others which appear in the act requires legislation, and not judicial construction." State ex rel. Mickey v. Reneau, 75 Neb. 1, 104 N. W. 1151, 106 N. W. 451.

"I need scarcely say to the able lawyers that I am now addressing that no such power exists in the courts in cases of casus omissus. If it is true that this contingency obsolutely escaped the attention of the law maker, then it is a case unprovided for, it is a casus omissus which cannot be supplied by judicial construction. I believe that is the doctrine of the law books. So that even looking at this case in the light that if we construed the law in a certain way, there would be a failure of the administration of the law, and hence considering every doubtful provision so as to make the law consistent with itself in all its parts, if that were necessary in this case, it would be impossible for any court to supply a casus omissus by giving force and effect to the language of the statutes when applied to a subject about which nothing whatever is said, and which, to all appearances, was not in the minds of the legislature at the time of the enactment of the law." In re Contest Proceedings, 31 Neb. 262, 47 N. W. 823, 10 L. R. A. 803.

Any attempt to hold that approval of a sale is inferred or intended as justifying constitutionality is nothing less than judicial legislation. It is true that in the case of

ambiguous language the court should give a construction consistent with the legislative intent, but where nothing is said at all concerning what is determined to be a defect, there can be no saving by construction because there is nothing to construe. In any event, in this case the legislative record indicates that the legislative intent was otherwise. The failure to provide for a review of the public sale price is constitutionally bad. Upset bids, fraudulent bids, the chilling of bids, etc., are all left by this act without remedy by the trustees.

This court is committed to the view that the equity jurisdiction conferred by the terms of the Constitution is beyond the power of the Legislature to limit or control. Lacey v. Zeigler, 98 Neb. 380, 152 N. W. 792. In John A. Creighton Home v. Waltman, 140 Neb. 3, 299 N. W. 261, we held that jurisdiction over the administration of trusts and supervisory jurisdiction over charitable trusts are inherent in equity courts of this state and in this court.

The constitutional directive of control over the Board by the phrase "under the direction of the Legislature" was not intended to and is not of sufficient breadth to allow the Legislature to take over the prerogatives of the Board. To hold otherwise would make the constitutional provisions for the Board meaningless.

Paraphrasing what we said in State v. Bartley, 40 Neb. 298, 58 N. W. 966, the power to sell, lease, and manage the educational lands of the state is conferred upon a district Board. The Constitution has placed the duty of investing the permanent school funds of the state in this Board. The authority thus conferred, the Legislature is powerless to take it away. The Legislature may by statute provide the manner in which the educational lands shall be

leased or sold, yet it cannot empower *anyone but the Board* to sell or lease such lands. The Legislature may prescribe the mode or manner in which permanent school funds shall be invested, but it has no power to relieve the Board of the duty of making such investments, nor can it authorize any other person or board to invest said funds.

It cannot be denied that the Board in the exercise of its sound discretion may sell some or all of the school lands when in the best interests of the trust it should be done, nor can it be denied that the Legislature may direct the Board to sell school lands within proper bounds for a fiduciary. The problem arises because the acts being questioned mandatorily direct that all of the lands *must* be sold regardless of the wisdom of the action at the particular moment. Further, section 72-258, R. S. Supp., 1967, provides: "Such land shall be sold * * * by a representative of the Board of Educational Lands and Funds *or by the county treasurer* of the county in which the land is located, * * *." (Italics supplied.) This is an assumption of direct control over the school lands on the part of the Legislature, because the legislation mandatorily decrees that the land be sold, and dictates how the sales must be conducted and who may conduct them. What discretion is left the Board in the exercise of its constitutional duty to act only in the best interests of the trust?

In State v. Central Nebraska Public Power & Irr. Dist., 143 Neb. 153, 8 N. W. 2d 841, we held: "Any act of the legislature by which the legislature seeks to assume direct control over the public school lands and remove the control of the board of educational lands and funds is unconstitutional, null and void."

We reiterate, the act requires that *all* school land *shall*

be sold at the expiration of present leases. The Legislature is not directing but rather dictating that regardless of conditions the land be sold. What discretion has it left the Board? How, under this mandate, can the Board carry out its fiduciary responsibility for the trust estate? The law is well established that trustes acting in a fiduciary capacity must at all times exercise such case and diligence in the management and control of a trust estate as would be exercised by a man of ordinary skill and prudence in the management of his own affairs. The designation of public school lands as a trust in the Constitution has the effect of incorporating into the constitutional provisions the rules of law regulating the administration of trusts and the conduct and duties of trustes. A breach of trust in such a situation is in effect a violation of the constitutional provision and has the effect of invalidating the legislation authorizing the breach.

In State ex rel. Ebke v. Board of Educational Lands & Funds, 159 Neb. 79, 65 N. W. 2d 392, this court said: " 'The school lands were received and are held in trust by the State of Nebraska for educational purposes. The state as trustee of the lands and of the income therefrom is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity.' " See, also, Banks v. State, 181 Neb. 106, 147 N. W. 2d 132.

The rule as to the duty of a trustee is stated in First Trust Co. v. Exchange Bank, 126 Neb. 856, 254 N. W. 569, as follows: "As a general rule, the measure of care and diligence required of a trustee is such as would be pursued by a man of ordinary prudence and skill in the management of his own estate. 26 R. C. L. 1280, sec. 130. He must act honestly and faithfully, in what he believes to be the best interests of the cestui que trust. He must ex-

ercise sound discretion. He is bound to proceed with diligence in investigating the nature of the proposed investment, and to use such care in deciding as, in general, prudent men of intelligence and integrity in such matters would employ in their own affairs when making a permanent investment in which the primary object is the preservation of the fund, and the secondary one that of obtaining an income therefrom."

The trial court stated in its journal entry: "The record casts serious doubt on the wisdom of the Legislature in directing the sale of *all* school lands but, upon a showing that a fair market value will accrue from said sale, the court is without power to interfere and the 'prudent man rule' is satisfied." Obviously here we cannot equate market value with the "prudent man rule." If the trial court was correct, and if the trustees obtained the best price obtainable at a particular moment, although to sell at that moment was foolhardy, the "prudent man rule" would be satisfied. This is not the law. It is the duty of a trustee to exercise due care, diligence, and skill in the sale of trust property so as to secure the most advantageous return possible. A trustee is guilty of a breach of trust in selling trust property under disadvantageous circumstances which it is in his power to avoid. 54 Am. Jur., Trusts, § 436, p. 346.

There is no requirement in the statute for sales at fair market value except by inference. Nowhere is the Board given the right to reject an appraisal, to ask for a reappraisal, or to confirm or refuse to confirm a sale, and as pointed out heretofore, the intent of the Legislature was to deny the Board this right. All that the statute requires is that some representative appraise the property "as privately-owned land" and that the appraised value, what-

ever it may be, shall be the starting price. To sustain the questioned acts we are required to disregard basic principles of trust law. This we cannot do. The law is void and unconstitutional.

For the reasons given, we find the questioned statutes to be void and unconstitutional. We would reverse the judgment herein.

Boslaugh, Smith, and McCown, JJ.

Public auction of state lands imports ". . . a sale . . . with absolute freedom for competitive bidding. Any agreement . . .to stifle competition or chill the bidding is a fraud upon the principle upon which the sale is founded." State ex rel. Danaher v. Miller, 52 Mont. 562, 160 P. 513. The statutory requirements of appraisal and public auction assure that the trust will receive value for lands sold prior to 1975. Cf. Lassen v. Arizona Highway Dept., 385 U. S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515. Possibility of a glutted market in 1975 is too remote for consideration now.

School lands, income, and assets are held in trust and the administration of the trust estate is governed by the rules of law applicable to trustees acting in a fiduciary capacity. Anyone dealing with the school lands must do so with knowledge of, and subject to, the trust obligation of the state. Propst v. Board of Educational Lands & Funds, 156 Neb. 226, 55 N. W. 2d 653, 346 U. S. 823, 74 S. Ct. 39, 98 L. Ed. 348. The courts have jurisdiction to determine whether those rules of law have been complied with, and the power to set aside or confirm a sale. If the trustee, or persons dealing with the trust assets, desire a judicial determination as to the validity of any such sale, the courts are available. The fact that the sale statute

is silent as to the procedures for such a determination does not alter the law of trusts, nor relieve the trustee of its obligations, nor make the statute unconstitutional. The statutes, apart from the reference to county treasurers, are not vulnerable to plaintiff's attack.

Newton, J.

The controlling opinion of Boslaugh, Smith and McCown, JJ., concedes the correctness of the fundamental principle enunciated in the opinion of Spencer, J. The Legislature cannot constitutionally bring about a sale of trust assets without recognition of the requirement that the trustee obtain the most advantageous possible sale of such assets. They seek to avoid application of this proposition by reading into the statute the inherent powers of the court in such cases, yet they fail to cite a single precedent sustaining this position. This is in direct contradiction of the most basic of all rules of statutory construction.

The legislative intention, as evidenced by plain and unambiguous language, controls and a determination regarding constitutionality must be made on this basis alone. See Bachus v. Swanson, 179 Neb. 1, 136 N. W. 2d 189. The Constitution is the primary law of this state. If we are to hold, as does the controlling opinion, that any statute in derogation of a constitutional provision, when construed, shall have read into it any provision necessary to make it conform to constitutional requirements, or have read out of it provisions conflicting with the Constitution, we would effectively whitewash all legislative acts. We would then be assuming the position of a super Legislature with power to amend all such acts by judicial construction.

It is pointed out in the opinion of Spencer, J., that the Legislature, in the present case, specifically rejected lan-

guage which would have permitted the trustee to conform to constitutional requirements. How then can we, in interpreting this act, say that nevertheless the Legislature intended to do that which it refused to do? We would then be supplying by implication the very thing which the Legislature pointedly rejected. Neither reason nor law can sustain such a position.

STATE OF NEBRASKA EX REL. LOREN B. BELKER, APPELLANT, V. BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA ET AL., APPELLEES.

— N. W. 2d —

Filed March 10, 1970. No. 37004.

Appeal from the district court for Lancaster County: Bartlett E. Boyles, Judge. On motion for rehearing and reargument. See 184 Neb. 621, 171 N. W. 2d 156, for original opinion. Original opinion adhered to.

Ginsburg, Rosenberg, Ginsburg & Krivosha and Rodney P. Cathcart, for appellant.

Clarence A. H. Meyers, Attorney General, and Bernard L. Packett, for appellees.

Heard before White, C. J., Carter, Spencer, Boslaugh, Smith, McCown, and Newton, JJ.

On reargument, previous opinion adhered to.

Boslaugh, McCown, and Smith, JJ.

The central issue in this case, and the only real issue, is whether the Legislature is authorized to direct the sale of all school lands. It is our opinion that the constitutional provision which vests the general management

of all school lands and funds in the Board of Educational Lands and Funds "under the direction of the Legislature" authorizes the Legislature to direct the sale of school lands. Art. VII, § 1, Constitution of Nebraska.

The legislative history of the act does not appear in the record in this case. Whatever it may have been, there is nothing in the act, nor in any legislative history alluded to, which in any way limits or attempts to limit the jurisdiction or power of the courts to determine, in a proper proceeding, whether the sale of any school lands was conducted in the manner required by law.

Whether the sale of the lands should prove to be a wise decision or not, it is a decision which the people empowered the Legislature to make. This court has no authority to exercise a power which the people have constitutionally vested in the Legislature.

We adhere to the opinion originally filed in this case.

Carter, J. dissenting.

This matter arises after a reargument of the issues raised by the appeal. The three members of the court upholding the constitutionality of the act under Article V, section 2, Constitution of Nebraska, have concluded to adhere to the former opinion. I disagree with this disposition of the case.

Due to a temporary disability, I was not able to participate in the disposition of the case originally and Colwell, District Judge, sat in my stead. Having participated in the motion for a rehearing and the reargument of the case, I deem it necessary to state my views regarding the constitutionality of the legislation authorizing the sale of the school lands held in trust for the benefit of the common schools of the state.

The statutes primarily questioned here provide in part: "All lands, now owned or hereafter acquired by the state for educational purposes, shall be sold at the expiration of the present leases. * * * Prior to such sale, the land shall be appraised for sale purposes in the same manner as privately-owned land by a representative appointed by the Board of Educational Lands and Funds, and thereafter shall be sold at public sale at not less than the appraised value; Provided, * * *." § 72-257, R. S. Supp., 1967. "Such land shall be sold, at public auction, by a representative of the Board of Educational Lands and Funds or by the county treasurer of the county in which the land is located, to the highest bidder. The appraised value for sales purposes as provided in section 72-257 shall be the starting bid price. * * * Settlement shall be made by paying cash of not less than twenty percent of the purchase price at the time of sale and the balance shall be payable in cash within ninety days of the date of sale. If the person submitting the high bid for the land fails to pay the balance of the purchase price and complete the sale within ninety days his rights under the sale, including the twenty per cent down payment, shall be forfeited by the board and a new sale shall be authorized." § 72-258, R. S. Supp., 1967. It is clear to me that if the foregoing provisions are complied with, the sale is to be final and complete and the purchaser entitled to a deed.

The original concurring opinion of Boslaugh, Smith, and McCown, JJ., State ex rel. Belker v. Board of Educational Lands & Funds, 183 Neb. 621, 171 N. W. 2d 156, in sustaining the constitutionality of the foregoing provisions of the law holds that irrespective of the shortcomings of the statutes, the trustee, or persons dealing with the trust assets, have the courts available to them to determine whether or not the rules governing trusts have been

properly applied and that such fact is sufficient to sustain a holding of constitutionality. The opinion states: "The fact that the sale statute is silent as to the procedures for such a determination does not alter the law of trusts, nor relieve the trustee of its trust obligations, nor make the statute unconstitutional." Under this theory, the Legislature can merely direct a sale and the courts will supply the missing language, compel compliance with such directions of the court, and hold the act constitutional. This has been tried many times in this state with fatal results in each and every instance. Cases in this court consistently and unanimously support such results. They are cited in the dissenting opinion of Spencer, J., in State ex rel. Belker v. Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156, and will not be repeated here. In 82 C. J. S., Statutes, § 328, p. 635, it is said in part: "It has been held to make no difference that the omission resulted from inadvertence, or because the case in question was not foreseen or contemplated, or that as a result of the omission the statute is a nullity."

The controlling opinion in this case concedes that the school lands of this state are held in trust for the benefit of the common schools. The relationship of trustee and beneficiary is a fiduciary one imposing the utmost good faith in the handling of the trust property. Among the duties of a trustee is to require in the case of the sale of trust property that he shall obtain the highest price possible and refuse to make a sale if the sale was fraudulent, or the result of chilled bidding, or any other conduct or circumstance that resulted in an inadequate sale price. The statute under consideration provides for an appraisal and a public sale, after which, if the bid price equals or exceeds the appraisal price, the sale is completed upon payment of the bid price within 90 days. The statute there-

fore deprives the trustee, the Board of Educational Lands and Funds, from exercising the powers and duties of a trustee imposed by the creation of the trust relationship by the Constitution.

It is asserted in the controlling opinion that the failure to provide for the sale of school lands consistent with its trust status may be read into the statute by implication and enforced as if written into the statute. This is simply not true. See 82 C. J. S., Statutes, § 328, p. 635. An implication to be drawn from the absence of language in a statute is a mere guess and the guess, if made, is judicial legislation. But assuming, solely for the purpose of argument, that there is language in the statute from which an intent can be implied, the position of the controlling members of the court remains wholly untenable under the facts in this case.

The history of the act shows conclusively that the Legislature intended that the appraisal, sale, and payment were to constitute the sole basis for the passing of ownership. The right of the trustee to perform its duty was intended to be cut off. Its duty to protect, conserve, and safeguard the assets of the trust for the benefit of all its beneficiaries and its liability for loss thereof resulting from its failure to exercise reasonable care, prudence, and diligence were cast aside in favor of a summary binding sale for the very purpose of subverting the duty of the trustee and the rights of beneficiaries.

The history of the statutes under consideration is set forth in the dissent of Spencer, J., in State ex rel. Belker v. Board of Educational Lands & Funds, *supra*, and will be only briefly set forth here. The statutes here involved were before the Legislature in their present form. An

amendment was offered that would give the Board of Educational Lands and Funds the right to reject bids. The amendment was rejected, plainly indicating that the Legislature did not intend that such board as trustee could see to it that the land did sell for its highest market price. This legislative action demonstrated that the Legislature intended to obstruct the trustee in the performance of its duty and to provide for a complete sale if the bid equalled or exceeded the appraised value whether or not the best interests of the beneficiaries were served. That this was the intent of the Legislature is further shown by the provision that the county treasurer of the county in which the land was located could sell school lands, a person not even a trustee. With this situation existing, a court cannot possibly justify finding or creating a legislative intent contrary thereto by implication or otherwise.

In Love v. Wilcox, 119 Tex. 256, 28 S. W. 2d 515, 70 A. L. R. 1484, it is said: "No court could justify putting into a statute by implication what both houses of the Legislature had expressly rejected by decisive votes. The House and Senate Journals leave no room for doubt of the legislative intent to deny the power exercised by the State Committee in seeking to debar names from the primary ballots under the resolutions of February 1, 1930. Once the legislative intent is ascertained the duty of the court is plain. To refuse to enforce statutes in accordance wtih the true intent of the Legislature is an inexcusable breach of judicial duty, because an unwarranted interference with the exercise of lawful, legislative authority." See, also, Blome Co. v. Ames, 365 Ill. 456, 6 N. E. 2d 841, 111 A. L. R. 940; 50 Am. Jur., Statutes, § 330, p. 322.

In Long v. Poulos, 234 Ala. 149, 174 So. 230, the court said: "If the intention of the Legislature can be ascer-

tained from the language used and the history of the enactment, it is not necessary to apply any presumptions of law which will aid in the interpretation when its meaning does not otherwise appear. * * * We do not think it is necessary to draw upon such presumptions in this case because we think that without them we are able to ascertain the legislative intent."

In State, Department of Highways v. Busch (La. App.), 220 So. 2d 513, it was said: "We cannot supply by interpretation what our lawmakers have failed or refused to do by legislation."

"If legislative intent has meaning for the interpretative process it means not a collection of subjective wishes, hopes, and prejudices of individuals, but rather the objective footprints left on the trail of legislative enactment. Legislative intent can't be 'dreamed-up.' It can be *speculated about;* but it can be *discovered* only by factual inquiry into the history of the enactment of the statute, the background circumstances which brought the problem before the legislature, the legislature committee reports, the statements of the committee chairman, and the course of enactment. To pursue this course means work and hard work, but if it is pursued it is seldom that the pursuit is fruitless. An honestly conducted inquiry into these considerations will fail but infrequently to disclose to the inquirer the purpose and intent of the legislature and will clarify the applicability of the statute to the question in litigation." 2 Sutherland, Statutory Construction (3d Ed.), § 4506, p. 321.

"Be this as it may, judicial interpretation should never be judicial legislation. We may not, therefore, under the guise of interpretation, read into a statute matters which

have been omitted by the legislature particularly where it appears that the omission might have been intentional." In re Estate of Barnett, 97 Cal. App. 138, 275 P. 453.

"There are two well established rules by which we must be governed in construing a statute. On the one hand, we must give effect to each and every part of it; on the other, we are not permitted to read into a statute anything which we may conceive the legislature may have unintentionally left out. Rather than violate the latter rule, the court will leave ambiguous phrases of statutes ineffective and refer their correction to the legislature. And that is what must be done with respect to the phrase we are considering. * * * To render the phrase effective would require much supplementation by the court. * * * To supply these deficiencies in the act in order to give effect to the ambiguous phrase, would amount to judicial legislation. From the phrase itself, we think it would be a violent assumption to say that the legislature intended in any manner to change or modify our long established practice and procedure with respect to the appointment of trustees for insolvent corporations. That such an assumption would be repugnant to the legislative intent, is apparent from the title of the act, * * *." Seattle Assn. of Credit Men v. General Motors Acceptance Corp., 188 Wash. 635, 63 P. 2d 359.

"In the same case it was also held that 'the court cannot, under its powers of construction, supply omissions in a statute, especially where it appears that the matter may have been intentionally omitted.'" Appeal of Infants Welfare League Camp, 169 Pa. Super. 81, 82 A. 2d 296.

"If the omission was intentional, no court can supply

it. If the omission was due to inadvertence, an attempt to supply it by including the omitted case would be tantamount to adding to a statute a meaning not intended by the Legislature." Mitchell v. Mitchell, 312 Mass. 154, 43 N. E. 2d 783.

The foregoing authorities when applied to the facts in this case show the plain intent of the Legislature to circumvent the duties and liabilities of the trustee and the right of the beneficiaries of the trust to have the trust property sold for the highest market price obtainable in accordance with the fiduciary relationship of the parties. The holding of the controlling opinion that the court may supply the missing legislative intent by interpretation or implementation, even though it is directly contrary to the real purpose and intent of the Legislature, is nothing more than judicial legislation and an encroachment upon the powers of the Legislature forbidden by the separation of powers provision of our state Constitution. The very idea that this court may rewrite a statute and give it effect, even though in conflict with the ascertained and real intent of the Legislature, is abhorrent to every student of constitutional government.

"In Armstrong v. Board of Supervisors, 153 Neb. 858, 46 N. W. 2d 602, it is said: 'If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature.' See, also, Federal Farm Mortgage Corp. v. Adams, 142 Neb. 202, 5 N. W. 2d 384; 50 Am. Jur., Statutes, § 225, p. 204. A statute is not to be considered as appropriate for construction as a matter of course. It is only ambiguous statutes of uncertain meaning to which the rules of construction have application. In Cross v.

Theobald, 135 Neb. 199, 280 N. W. 841, this court said: 'Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.'" Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409.

"We are not warranted in supplying words which appear to have been designedly omitted, or in accomplishing the same result indirectly by giving to the words used the broad import and meaning for which the state contends." State v. Pence, 173 Ind. 99, 89 N. E. 488.

"This being true, must we not accept the statute as we find it and concede that the General Assembly in its wisdom omitted the word 'newspapers' from the second sentence for some reason which appeared to that august body to be sufficient? Whatever may have influenced the General Assembly to omit the word 'newspapers' from the second sentence in the statute, if it did purposely do so, is sufficient, and courts are not authorized to interpolate words into a statute which the lawmaking body has purposely omitted. * * * The learned trial judge delivered a written opinion from which we take the following pertinent observations: 'The argument of the Commonwealth is that the word "newspapers" was inadevertently omitted by the legislature in the second sentence adverted to, and having been inadvertently omitted by the legislature, it should be included by the court. This seems to me clearly to confound the functions of these two agencies of the government. Under the Constitution it is the province of the legislature to enact and the province of the judiciary to interpret, and it is of vital importance to the maintenance of our institutions that the functions of the two departments shall be kept separate and distinct as provided

in the Constitution. However beneficent a law might be, it is for the legislature to pronounce it. However much public policy may demand the enactment of a law, the court cannot enact it.'" Commonwealth v. Lipginski, 212 Ky. 366, 279 S. W. 339.

"In the construction of statutes, words should never be supplied except to effectuate a meaning clearly shown by the other parts of the statute and to undertake to augment the substance of a statute as here desired would be an abortive act of legislation rather than a proper exercise of the power of judicial construction." Saslow v. Previti, 17 N. J. Misc. 29, 3 A. 2d 811.

The controlling opinion, however, purports to sweep these fundamental concepts under the rug by stating that they have no application because equity courts are open to enforce the duties, liabilities, and fiduciary relationship of the parties. Let us examine the validity of this holding, a holding supported by no legal authority, court decision, or authoritative text, in the controlling decision of this case.

I am in full agreement with the controlling opinion that our equity courts have general supervisory powers over the administration of trusts. According to available records, the value of unsold school lands was at least $70,100,000. The number of tracts to be sold is not known to me but there are at least 544 since there are that many tracts under lease. Under the theory of the controlling opinion, it is possible that a minimum of 544 suits would be required to insure that the trustee procured the highest possible market value of the land for the benefit of the beneficiaries of the trust. It is not at all likely that the Board of Educational Lands and Funds would bring such suits, a

board whose duties are prescribed by the Legislature and whose salaries are fixed by it. If a beneficiary brought suit to determine the adequacy of the sale price, the cost of attorneys' fees and court expense would probably far exceed the benefit accruing to a single benficiary even if the litigation proved successful. But more important still, the statute deprives the trustee of its duty to act in the capacity of a fiduciary and the duties and responsibilities of the trustee acting in its fiduciary capacity. It deprives the beneficiaries of the benefit of the trustee in seeing to it that the highest market price is obtained for the common schools of the state. It would subject the state to the payment of losses from sales not made in accordance with the law governing the sale of trust property as provided in Article VII, section 9, of the Constitution. I submit that the theory announced in the controlling opinion is not only not in accordance with law but, for all practical purposes, provides no adequate remedy for a breach of the fiduciary relationship. I submit that the power of the courts to control the administration of trust property can best be exercised by insisting that the statute providing for the sale of school lands be consistent with the sale of trust property and the duties, liabilities, and benefits accruing to trustees and beneficiaries growing out of the fiduciary relationship of trustee and beneficiary created by the Constitution. I submit that the theory of the court's opinion is unworkable, defeats the purposes of the law of trusts, and in practice provides no effective protection to the beneficiaries of the trust. I submit that the general power of equity courts to supervise trusts through collateral attack does not afford an adequate remedy, nor does it comply with the necessary attributes of due process. In addition thereto, a multiplicity of suits would be required to insure compliance with the law of trusts and the protection of the beneficiaries of the trust.

This case has been twice argued. In each argument four judges were of the opinion that the statutes were unconstitutional. In the first argument, Colwell, District Judge, sat as a member of the court. In the second, I resumed my place on the court and Colwell, District Judge, did not participate. The result is that five judges sat on the two arguments who firmly believe that the act before us is unconstitutional. On the other hand, the same three members of the court have stood in the shadow of Article V, section 2, of the Constitution, and insisted that the act is constitutional. I do not intend to infer any irregularity in constituting the court in either instance. There was none. My only comment is that three members of the court under the provisions of Article V, section 2, of the Constitution, are authorized to sustain the constitutionality of a legislative act without citing a single case or text authority. On the other hand, the five dissenting members of the court have cited ample authority to sustain their position that the act is unconstitutional. I submit in all fairness that if the position of the three members of the court can sustain their holding of constitutionality, and I am confident they cannot, it is encumbent upon them to do so. In my opinion, the controlling opinion is legally unsound and the failure to cite supporting authority affords some evidence to confirm that opinion.

The purpose of the statute is shown by the language of the act and the history of its enactment. It is clearly demonstrated that the legislative intent is to make the sale therein provided the final completion of the sale to the highest bidder. The object of the controlling opinion is to avoid questions of unconstitutionality by a construction contrary to the intent of the Legislature. This is judicial legislation under all of the authorities and is violative of the division of powers provision of the state

Constitution. Such a construction is not only void as judicial legislation, but it has the effect of eliminating the protection afforded the resulting trust fund and its beneficiaries by virtue of its status as trust property. The purported remedy of the controlling opinion is not only inadequate, but it will require a multiplicity of suits to enforce the protections required by the Constitution in designating the school lands of the state as trust property. I submit that our adopted opinion is contrary to the Constitution and the applicable law, is an arbitrary assumption of legislative powers by rewriting the act contrary to the intent of the Legislature, and has the effect of circumventing the rights of the beneficiaries of the resulting trust fund by a disregard of the manner provided for the sale of trust property. The act is unconstitutional and void, and contrary to the best interests of the state, the beneficiaries of the trust fund, and the good conscience of a court of equity.

Simple justice and the applicable law require that its beneficiaries should be protected with the utmost fidelity without the necessity of engaging in costly collateral litigation. I submit that the controversial statute is wholly void and arbitrary and that the only legal and adequate remedy is a declaration of unconstitutionality by this court. Having these views, I emphatically dissent from the unsupported holdings announced in the opinion of the controlling members. I would reverse the judgment of the district court and enter a declaration of unconstitutionality.

White, C. J., and Spencer and Newton, JJ., join in this dissent.

Separate Opinion by Smith, J.

From original submission of this case on January 14,

1969, almost 14 months have elapsed. The interval, highly abnormal for this court, is an example of predilection for delay that we ought to prevent.

Spencer, Jr., dissenting.

I reaffirm my dissent to the three-judge opinion upholding the constitutionality of sections 72-257 and 72-258, R. S. Supp., 1967, and 72-258.01, R. R. S. 1943 (as amended by Laws 1965, c. 435, §§ 2, 3, and 4, pp. 1386 and 1387, and Laws 1967, c. 466, §§ 10 and 11, p. 1450), found at 184 Neb. 621, 171 N. W. 2d 156. I am authorized to state that White, C. J. and Carter and Newton, JJ., adhere to that previously declared position.

The controlling opinion in this case states that the only real issue is whether the Legislature is authorized to direct the sale of all school lands. This is not the issue at all. No contention is advanced by anyone that the power to sell school lands is not lodged in the Legislature. The issue is whether the statute implementing the constitutional authorization to sell meets the requirements for the sale of trust property where, as here, the Constitution declares it to be such. The dissenting opinion of Judge Carter points out not only that the statute does not comply, but that it was the intention of the Legislature not to comply.

Additionally, I attack the right of three members of this court to override a majority opinion, and state that the following sentence from Article V, section 2, Constitution of Nebraska, "No legislative act shall be held unconstitutional except by the concurrence of five judges," is itself unconstitutional.

The Enabling Act of Congress, permitting the people of Nebraska to adopt a Constitution and form a state gov-

ernment, required a republican form of government not repugnant to the Constitution of the United States and the principles of the Declaration of Independence. As the Supreme Court of Colorado said in People v. Western Union Telegraph Co., 70 Colo. 90, 198 P. 146, 15 A. L. R. 326: "The original Constitution of Colorado was a solemn compact between the State and the Federal government, a compact which stipulated that it should never be altered save in the manner therein provided, and that all amendments and all revisions thereof would conform to the supreme law. The whole people of the state have no power to alter it save according to their contract. They cannot do so, even by unanimous consent, if such alteration violates the Constitution of the United States. Should they make the attempt their courts are bound by the mandate of the Federal Constitution, and by the oath they have taken in conformity therewith and with their own Constitution, to declare such attempt futile, to disregard such violation of the supreme compact, and decline to enforce it. There is no sovereignty in a state to set at naught the Constitution of the Union, and no power in its people to command their courts to do so. That issue was finally settled at Appomattox."

This provision does not limit the authority of this court to declare an act unconstitutional if it is in violation of the state Constitution only, but prohibits such declaration without five votes, whether it is unconstitutional under the state *or* federal Constitution. This is violative of the federal Constittuion. Any dilution of the judicial power shatters the fundamental principle that government is divided into three branches—legislative, executive, and judicial. Any limitation upon what is rightfully a part of the judicial power destroys the republican form of government. If it is possible to require more than a majority

vote, is it not also possible to require a unanimous vote? To so hold is foreign and hostile to our republican form of government.

There are certain acts which even the state Constitution cannot abrogate. One of these is to limit the authority of this court to exercise its sovereign and inherent power as the judicial branch of government, free from the dictates of the Legislature.

This constitutional provision as applied in the instant case permits the Legislature to dilute the inherent power of this court, as well as depriving the beneficiaries of the public school lands' trust of property without due process of law. In other jurisdictions a simple majority may hold a legislative act unconstitutional. Because of this provision, Nebraska requires five of seven judges to so hold. Citizens of Nebraska are not therefore entitled to all of the privileges of citizens in the several states.

The Supreme Court of the United States in Reitman v. Mulkey, 387 U. S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830, struck down an act of the State of California which sought to prohibit open housing laws unless first approved by a majority vote of the people of California. The court held that even a majority could not promulgate legislation inherently contrary to rights afforded an individual under the Constitution of the United States. I maintain that our constitutional provision permitting a minority of the citizens of Nebraska, as represented by three judges upon this court, to thwart the will of the majority is in violation of the equal protection clause of the Constitution of the United States.

White, C. J., dissenting.

As early as 1894 and as recently as 1962 this court

has stated and reaffirmed the princple that the constitutional authority and power to sell, lease, and manage the educational lands of the state is conferred upon a district board and that the authority thus conferred, the Legislature is powerless to take away. At the present time the Board of Educational Lands and Funds has sole power under the Constitution to manage and control school lands. State ex rel. Crounse v. Bartley, 40 Neb. 298, 58 N. W. 966; State v. Kidder, 173 Neb. 130, 112 N. W. 2d 759.

This constitutional function conferred upon the board "under the direction of the legislature" has been present since 1875. Nebraska Constitution of 1875, Article VIII, section 1; Nebraska Constitution of 1920, Article VII, section 1. In light of the above language it is clear that the responsibility, duty, and discretion to sell, lease, and manage the school lands is in the board and not the Legislature. Thus the word "direction" in the phrase "under the direction of the Legislature," cannot be construed to mean command. Rather, the word "direction" must be defined as meaning care and superintendence; a guidance or supervision of action, conduct, or operation. Town of Palatine v. Canajoharie Water Supply Co., 90 App. Div. 548, 86 N. Y. S. 412; Webster's Third New International Dictionary, p. 640 (1968). The prevailing minority states that "under the direction of the Legislature" authorizes the Legislature to direct the sale of school lands and also that whether the sale of the lands should prove to be a wise decision or not, it is a decision which the people have constitutionally vested in the Legislature.

One instance is sufficient to emphasize the fallacy in this reasoning. As pointed out by Carter, J., in the present case, and Spencer, J., in his previous opinion, the statute does not provide for, and the legislative intent was to

prohibit, giving the board any right to reject or confirm bids. State ex rel. Belker v. Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156. It cannot be denied that the right to confirm or reject bids at a sale of land is the very essence of discretion. Thus, without any consideration of applicable trust law, it is clear under our previous decisions that the Legislature has usurped the constitutional duty of the board. Such usurpation is itself unconstitutional. The prevailing minority blithely permits this by stating that it is the will of the people with total disregard, or possibly distain, for the previous interpretations this court has placed upon the stated will of the people. The direction to sell, while reserving no discretion in the board to confirm or reject bids, is more than a guidance or supervision of action, conduct, or operation. It is the arbitrary assumption of duties constitutionally placed upon the board by the will of the people and thus must fail as being unconstitutional.

This reasoning is also supported by the fact that Article VII, section 8, of the Constitution, pursuant to a 1920 amendment, states that school lands shall not be sold except at public auction under such conditions as the Legislature shall provide. This power to set the conditions of sale is a function of guidance or supervision and cannot be looked at as giving the Legislature the power to command sale of the school lands. The language used here clearly infers that the Legislature is not vested with the power to command sale of the school lands.

The prevailing minority states that there has been no present abuse of the trustee's discretion and that if an abuse is present when the land is sold an action on behalf of the beneficiaries may then be brought. As pointed out by Carter, J., this is in effect, no remedy at all as in-

dividual benefits would be grossly disproportionate to the costs of such an action by a trust beneficiary.

Aside from the ability of the Legislature to make such a command, the command itself is clearly a blatant violation of the trustee's discretion. The Legislative command in 1965 to sell all of the school lands as the leases expire, with over half of the land going on the market in 1975, show total disregard for what future market conditions in a volatile economy may be. The lands are required to be sold without regard to the possibility of a depressed economy, a glutted market, or the availability and cost of money to purchase the land. Such a policy is clearly not prudent and is an abuse of the trustee's discretion. As such, it should be stopped in its gestation rather than aborted on a piecemeal basis as the expiration of each lease gives birth to a sale. As pointed out by Carter, J., the latter alternative is a totally inadequate remedy. I submit that the 1965 command is a present violation of the trustee's discretion as it governs sale of all the land, not just the sale of an isolated tract which may or may not be wise at the time sold.

An additional consideration is the fact that the available investments for proceeds of the sales are limited. In considering the wiseness of a sale it cannot be isolated from what will become of the proceeds. Land has been on a general rise in value for some time, the same is not true of legally permitted investments. The investments permitted by statute, section 72-202, R. R. S. 1943, are generally of the type considered as income investments rather than capital appreciation investments. To some extent the opposite is true of land. The possibility of increased income for the use of common schools is attractive, but it should not be used to close our eyes to the fact that in

this age of inflation most investment analysts would advise a balanced portfolio which would also provide for capital appreciation. This might well be impossible if all of the school lands were sold and the proceeds invested pursuant to section 72-202, R. R. S. 1943. A trustee is required to dispose of trust property upon the most advantageous terms which it is possible for him to secure for the benefit of the cestui que trust whom he represents. State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520. To be prudent embraces foresight to the extent that reinvestment of the proceeds is predetermined, as it is under section 72-202, R. R. S. 1943. This, among other things, is indicative of the trustee's violation of discretion and the consequent invalidity of the act.

Article IV, section 3, of the Constitution of 1866, gave exclusive chancery and common law jurisdiction to the district courts and Supreme Court. This theme has continually been carried forward and is presently stated in Article V, section 9. The Legislature is powerless to take away the equity jurisdiction conferred by the Constitution. Lacey v. Zeigler, 98 Neb. 380, 152 N. W. 792. Jurisdiction over the administration of trusts and supervisory jurisdiction over charitable trusts are inherent in equity courts of this state and in this court, and the Legislature has no power to limit or control this jurisdiction. John A. Creighton Home v. Waltman, 140 Neb. 3, 299 N. W. 261.

The framers of the original Constitution placed the school lands in trust with the fund to remain inviolate and undiminished. The creation of a trust and provision that the funds remain inviolate clearly shows the intent of the framers that the courts, through their equity jurisdiction, should retain control and supervision over the fund to pre-

vent or remedy any and all violations of th trustee's duty.

The gift of this land under the Enabling Act and the acceptance and constitutional provisions for it are in the nature of a trust deed forming a solemn compact with the federal government. The state, in its generic sense, is the trustee with all branches of govrnment participating in the administration of the trust. The Board of Educational Lands and Funds, executive branch, has the power to sell, lease, and manage under the direction of the Legislature and subject to the supervisory powers of the equity courts. It cannot be argued but that the creation of this trust under such a system of checks and balances was to guard against any violation of the trustee's discretion. Should the fact that a 1920 constitutional amendment will allow a legislative act to be overturned only by five votes of this court be permitted to disrupt this system of checks and balances? The answer must be an unequivocal no. A review of the history of the 1920 Constitutional Convention reveals not the slightest intent to invade or impede this court's jurisdiction to control and administer, in a proper case, the provisions of this trust and to protect the school children of the State of Nebraska against any type of action whether by the people directly or by legislative action.

It is the duty of the courts to reconcile and harmonize, if reasonably possible, conflicting statutory or constitutional provisions. State ex rel. Johnson v. Marsh, 149 Neb. 1, 29 N. W. 2d 799; Swanson v. State, 132 Neb. 82, 271 N. W. 264; Elmen v. State Board of Equalization & Assessment, 120 Neb. 141, 231 N. W. 772; 16 C. J. S., Constitutional Law, §§ 16, 23, 25, 26, and 38, pp. 72, 91, 98, 99, and 117. In a literal context the 5-2 provision would seem to apply to any act of the Legislature. However,

when we examine the context of the school lands trust, its origin, its formulation in the constitutional provisions, and the duties of this court in enforcing the administration of this trust, it seems to me that "an act of the Legislature" can never mean administrative actions by the Legislature in behalf of the state in the exercise of its power as a trustee of the school lands. To otherwise hold would give the Legislature a power superior to that of the judicial or executive branch and clearly defeat the careful system of checks and balances formulated by the drafters of the Constitution to protect this trust. The compact establishing this trust was in form a constitutional provision, but in substance a trust deed. If the fundamental nature of the administrative power over the school land trust is to be circumscribed by independent judicial control, it cannot be transcended by such state action taking the form of an exercise of the general law-making power.

Under the original compact and its acceptance by the people of the State of Nebraska, no state action whether in the guise or form of legislative action or constitutional amendment of any nature whatsoever can assume to the Legislature the arbitrary and unreviewable power to manage the corpus of this trust as it sees fit.

The problem here is fundamental and it is also unique in trust law. It is unique because the trustee itself (the State) has embodied and integrated within itself the general law-making power through which the legislative will of the people must be expressed. Can this power be used to transcend its limitations? Is a declaration by the trustee state in the form of a legislative enactment necessarily an exercise of legislative power in any respect? Can the same power that administers the trust determine its extent? Can the original limitations incorporated by

solemn compact be extended by the ordinarily overriding sovereignty of the state? Can the trustee pull itself up by its own boot straps?

Research reveals one case parallel, though not exactly in point, with the situation presented here. In Bridgeport Public Library & Reading Room v. Burroughs Home, 85 Conn. 309, 82 A. 582, the court was faced with the problem of a legislative act or resolution for the sale of real property held by a charitable public trust under the direction and control of the state Legislature. The parallelism to our case here was aptly stated by the Supreme Court of Connecticut as follows: "The decision of the Supreme Court of the United States in Stanley v. Colt, 5 Wall. (U. S.) 119, supported by others prior and subsequent, removes from the field of discussion any question as to the existence of a power in the sovereignty of the State fully adequate to bestow upon trustees administering a public charitable trust authority as to its administration such as the General Assembly attempted to confer in the present instance. Perin v. Carey, 24 How. (U. S.) 465, 501; Ould v. Washington Hospital, 95 U. S. 303, 312; Jones v. Habersham, 107 U. S. 174, 183, 2 Sup. Ct. Rep. 336."

That court disposed of the issue in that case without examining any question as to "constitutionality." In its opinion the court held, in language self-explanatory as to its application here, as follows: "* * * there has remained no doubt that our Constitution is to be construed as a grant and not as a limitation of power, and that the *exercise of judicial power is forbidden to the legislative branch of the government, as the legislative is to the judicial.* * * * The legislative power must be found somewhere outside of the judicial domain, and within the legislative, or *it is nonexistent.* * * * It concerns a trust, which is em-

phatically a matter of conscience, and a charitable trust, which is peculiarly the subject of a court of equity's care and solicitude. Bispham's Principles of Equity (8th Ed.) § 8; Stanley v. Colt, 5 Wall. (U. S.) 119, 169. The power is one which has come into our American jurisprudence in conformity with the English original, and is an adjunct of the judicial power. Its exercise involves an appeal to the conscience of the chancellor through an application duly made, an inquiry, and a determination embodying the exercise of discretion. These are peculiarly judicial functions. The judicial power includes such power as the courts, under the English and American systems of jurisprudence, have always exercised in legal and equitable actions."

That court continued: "We have no occasion to attempt to define the exact limits of either the judicial or the legislative power, *or to draw the dividing line between the two. It is certain, wherever that dividing line may be* or however indefinite it may be at points, that jurisdiction over this charitable trust, to see that it is properly and beneficially administered, that the purpose of the donor does not fail, and that the interests of the beneficiaries be subserved, under changing conditions and with the lapse of time, belongs to the judicial department of the government, *and is in no respect an incident of the legislative.*

"The resolution of the General Assembly in question, in so far as its purports to confer authority upon these trustees, must therefore fail of its purpose. The courts, in the exercise of their chancery powers, are alone competent to confer such authority. That authority not having been obtained, any attempt on the part of the trustees to sell the property would be in excess of their powers." (Emphasis supplied.)

This court has consistently held that a violation of the trustee's duty is a violation of the Constitution itself. In this case, we are compelled to go one step further and hold that the Constitution itself and any agency purporting to act under its delegated powers may not violate this trust in the guise of a constitutionally exercised power. A majority of this court has determined that the legislative act is a violation of the trustee's fiduciary duty. A majority now holds that the power sought to be exercised is subject to the supervisory control of the courts in their exclusive constitutional jurisdiction over the supervision of charitable trusts. A majority now holds that this supervisory control and jurisdiction may not be limited or changed by the trustee state (even though sovereign) by casting the extension of their powers or the violation of their trust duties in the form or the guise of a "constitutionally" exercised "legislative" power.

In conclusion it has been said that the protections of procedure are of the essence of due process. No better illustration could be made of that principle than in the context of this case. Our original Constitution and all subsequent Constitutions and amendments have created the procedural power necessary for the district and Supreme Courts to supervise and administer the school lands trust and to guard against invasions of the beneficiary's rights by state action of any nature whatsoever. To hold that these basic powers enumerated and declared in the Constitution may be eroded, no matter in how infinitely small degree, is, in my opinion a violation of our constitutional mandate to protect and guard this sacred trust against invasion by either the Legislature or by the people themselves.

Carter, Spencer, and Newton, JJ., join in this dissent.

APPENDIX B

72-257. School lands; sale directed at expiration of lease; appraisal; limitation on price. All lands, now owned or hereafter acquired by the state for educational purposes, shall be sold at the expiration of the present leases. The Board of Educational Lands and Funds shall retain all mineral rights in the land sold. Prior to such sale, the land shall be appraised for sale purposes in the same manner as privately-owned land by a representative appointed by the Board of Educational Lands and Funds, and thereafter shall be sold at public sale at not less than the appraised value; *Provided*, that when two or more contiguous tracts within a section are under separate leases with different expiration dates the board may, if it is deemed to be in the best interest of the state, defer the sale of any tract of one hundred sixty acres or less having an earlier lease expiration date, and may offer the tract for lease for less than twelve years to coincide with the expiring lease of the contiguous tract, in order that the contiguous lands within a section may eventually be offered for sale on the same date.

Source: Laws 1921, c. 81, § 1, p. 294; C.S. 1922, § 5215; C.S. 1929, § 72-235; Laws 1935, c. 163, § 17, p. 609; C.S. Supp., 1941, § 72-235; Laws 1943, c. 161, § 1, p. 575; R. S. 1943, § 72-257; Laws 1949, c. 214, § 2, p. 611; Laws 1951, c. 239, § 1, p. 846; Laws 1961, c. 352, § 1, p. 1112; Laws 1963, c. 419, § 1, p. 1345; Laws 1965, c. 435, § 2, p. 1386; Laws 1967, c. 466, § 10.

Effective date October 23, 1967.

72-258. School lands; sale; notice; terms; partition; failure to make settlement; forfeiture of deposit. Such land shall be sold, at public auction, by a representative of the

Board of Educational Lands and Funds or by the county treasurer of the county in which the land is located, to the highest bidder. The appraised value for sales purposes as provided in section 72-257 shall be the starting bid price. Notice of such sale and the time and place where the same will be held shall be given by publication three consecutive weeks in some legal newspaper published in the county where the tracts of land or the lots are located or, in case no legal newspaper is published in said county, then in some legal newspaper of general circulation therein. The proof of such publication shall be made by the affidavit of the publisher, foreman or principal clerk of such newspaper or by some other person knowing about the same, and shall be filed in the office of the Board of Educational Lands and Funds; *Provided*, when the land consists of an undivided interest in realty, an action to partition may be maintained in the same manner as provided by law for the partition of real property among several joint owners. All notices of sale shall be posted in the office of the Board of Educational Lands and Funds. The board may arrange for such commercial advertising of land sales as it deems in the best interest of the state. Settlement shall be made by paying cash of not less than twenty per cent of the purchase price at the time of sale and the balance shall be payable in cash within ninety days of the date of sale. If the person submitting the high bid for the land fails to pay the balance of the purchase price and complete the sale within ninety days his right under the sale, including the twenty per cent down payment, shall be forfeited by the board and a new sale shall be authorized.

Source: Laws 1921, c. 81, §2, p. 295; C.S. 1922, § 5216; C.S. 1929, § 72-236; Laws 1935, c. 163, § 18, p. 610; C.S. Supp., 1941, § 72-236; Laws 1943, c. 161, § 2, p. 576; R. S.

1943, § 72-258; Laws 1965, c. 435, § 3, p. 1386; Laws 1967, c. 467, § 16; Laws 1967, c. 466, § 11.

Effective date October 23, 1967.

72-208. School and saline lands; sale; deeds; recording; reception in evidence. When the Board of Educational Lands and Funds becomes satisfied that full payment has been made on any tract of land sold by the state, the Governor shall issue a deed to the purchaser or his assigns, and all deeds issued by him shall be countersigned by the Secretary of State and under the Great Seal of the state, and shall be attested by the secretary of the board and a record kept in his office. All deeds so issued shall be subject to record, and shall be received in evidence without acknowledgment, the same as deeds that have been acknowledged.

Source: Laws 1899, c. 69, § 7, p. 303; R. S. 1913, § 5851; C. S. 1922, § 5187; C. S. 1929, § 72-207; Laws 1935, c. 163, § 6, p. 597; C. S. Supp., 1941, § 72-207; R. S. 1943, § 72-208; Laws 1965, c. 435, § 1, p. 1385.

72-258.01. School lands; lands not sold after offer; leasing; period of lease. If such land should not be sold according to provisions of sections 72-208, 72-257, and 72-258, then it shall be offered for lease as the Board of Educational Lands and Funds shall provide for a period of six years. No such leased land shall be subsequently offered for sale until the expiration of such lease.

Source: Laws 1965, c. 435, § 4, p. 1387.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 218.

STATE OF NEBRASKA, ex rel. LOREN B. BELKER,
Appellant,

vs.

BOARD OF EDUCATIONAL LANDS AND FUNDS, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

SUPPLEMENTAL JURISDICTIONAL STATEMENT

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INDEX

Subject Index

	Page
Supplemental Jurisdictional Statement	1
Appendix	3

Cases Cited

Bessey v. Board of Educational Lands and Funds	1, 2

IN THE

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October Term, 1969

No. 1649

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ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

SUPPLEMENTAL JURISDICTIONAL STATEMENT

Since the filing of the Jurisdictional Statement by Appellant in this matter, the Supreme Court of the State of Nebraska has rendered and filed its opinion in the case of *Bessey v. Board of Educational Lands and Funds,* which appears at Appendix A attached hereto. The reason for submitting this supplemental jurisdictional statement is to further point out the errors made by the prevailing minority opinion insofar as it pertains to the law of trust. The prevailing minority in its opinion filed both on October 3, 1969, and on March 10, 1970, relied almost entirely

upon the proposition that the trust could be protected by having the Court examine each individual sale to determine whether or not it was in the best interest of the trust. This suggestion has now firmly been disavowed by the Court's opinion in the case of *Bessey v. Board of Educational Lands and Funds* filed July 24, 1970, and reported in 185 Neb. 801, —— N. W. 2d —— 1970. In an opinion by White, C. J., the majority of the Court held that the sale of school lands becomes final once the auctioneer's hammer falls, if the sale price is in excess of the appraised value. In the *Bessey* case, supra, the land was appraised, as required by Statute, at a value of THIRTY-FIVE THOUSAND EIGHT HUNDRED FORTY DOLLARS ($35,840.00). It sold to Bessey for FIFTY-SIX THOUSAND FIVE HUNDRED FIFTY DOLLARS ($56,550.00), that being the highest bid. Upon receipt of a new bid in the sum of SEVENTY-THREE THOUSAND TWO HUNDRED TWENTY-FIVE DOLLARS ($73,225.00), over twice the Board appraisal, the Board attempted to resell the property and the action of the District Court enjoined the new sale. The Supreme Court of Nebraska affirmed the judgment of the District Court. The decision of the *Bessey* case clearly points out how the law of trust will be totally ignored and perverted and how the rights of the beneficiaries of this trust will be ignored if property under the mandate of the legislative action can be sold at less than its true value though more than its appraised value.

Appellant offers this supplemental opinion as a further ground upon which the action of the Supreme Court of Nebraska decreed by a prevailing minority of three (3) judges should be reversed.

APPENDIX

F. FAYE BESSEY ET AL., APPELLEES, v. BOARD OF EDUCATIONAL LANDS AND FUNDS, STATE OF NEBRASKA, APPELLANT.

— N. W. 2d —

Filed July 24, 1970. No. 37445.

1. **Public Lands: Statutes.** The statute, section 72-258, R. S. Supp., 1967, declared valid and constitutional by State ex rel. Belker v. Board of Educational Lands and Funds, 184 Neb. 621, 171 N. W. 2d 156, provides that the school lands in Nebraska shall be sold at public auction by a representative of the Board of Educational Lands and Funds or by the county treasurer of the county in which the land is located, to the highest bidder.

2. ———: ———. The statute providing for the sale of school land, now in full force and effect, authorizes the Board of Educational Lands and Funds to resell the property only in the event that the highest bidder fails to pay the balance of the purchase price in 90 days.

3. **Statutes: Courts.** A court cannot, under the guise of its powers of construction, rewrite a statute, supply omissions, or make other changes and this is particularly true where it appears that the matter was intentionally omitted.

4. **Statutes: Courts: Legislature.** If the language of a statute is clear and unambiguous, the courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning not intended or expressed by the Legislature.

Appeal from the district court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellants.

Barney & Carter, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, SMITH, McCOWN, and NEWTON, JJ., and COLWELL, District Judge.

WHITE, C. J.

In this prophetic sequel to State ex rel. Belker v. Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156, on rehearing, *ante* p. 270, 175 N. W. 2d 63, we are now asked by the State to exercise a supervisory trust jurisdiction over the school lands trust to set aside a successful bid and order a new sale of school lands sold under the new statute directing their mandatory sale.

The statute, section 72-258, R. S. Supp., 1967, now adamantly and unequivocally held constitutional by the controlling minority opinion of the court, says in pertinent part as follows: "Such land *shall* be sold, at public auction, by a representative of the Board of Educational Lands and Funds or by the county treasurer of the county in which the land is located, *to the highest bidder.*" (Emphasis supplied.) Following this is the lone and only provision authorizing the board to resell the property which is only in case of the highest bidder's failure to pay the balance of the purchase price.

The essential facts of this case presenting the problem are very simple. The land was appraised under the statute (section 72-204, R. S. Supp., 1967) by the board at a value of $35,840. It sold to Bessey and Simmons, the appellees,

for $66,560, the highest bid. Upon receipt of a new bid in the sum of $73,225, *over twice the board appraisal,* the board attempted to resell the property and this action of the district court enjoined a new sale. We affirm the judgment of the district court.

The State does not contend that the sale was not conducted "in the manner required by law." The statute was strictly complied with and the minority declaration to that effect was fully complied with. See controlling minority opinion, State ex rel. Belker v. Board of Educational Lands & Funds, on rehearing, *ante* p. 270, 175 N. W. 2d 63, at page 271.

With a strange and paradoxical ambivalence, illustrative of the historic duality and conflict of interest between the beneficiary school children and the political pressures of private ownership, the State now reverses its position in Belker and asks the court to modify the language of the statute and step in and supervise this individual sale. It now contends that the Board of Educational Lands and Funds has the right and power to reject a sale and submit the same to further bidding, and that this court is either the creator or protector of this power and right.

But judicial restraint and a proper regard for the principle of separation of powers in our government forbids this charitable usurpation, because the very contention of the majority of this court that ultimate supervisory power over the sale of these lands was curtly and almost summarily rejected by the controlling minority in Belker. We will not burden this opinion with a quoting review of the Belker opinions. Could it be clearer that the *majority* contention of statutory invalidity because of legislative emasculation of the board's and this court's constitutional trust powers,

was rejected out of hand? The declaration is that the statute is constitutional and wholly valid. It means what it says, and says what it means. No one suggests any ambiguity or vagueness in its language. History alone dictates that its design was to remove all interfering impediments to mandatory sale. It says, "* * * *shall* be sold at the expiration of the present leases, * * * at public auction, * * * to the highest bidder." (Emphasis supplied.) A new sale can only be held by the board when the bidder fails to pay. §§ 72-257 and 72-258, R. S. Supp., 1967.

The now asserted contention that we can hybridize the statute and write in some saving clause has already been passed on and disposed of by a majority of this court. As later discussed in this opinon, the now revealed offer of an amendment to accomplish such an objective was defeated. In State ex rel. Belker v. Board of Educational Lands and Funds, on rehearing, *ante* p. 270, 175 N. W. 2d 63, at page 273, the majority of this court said: "The history of the act shows conclusively that the Legislature intended that the appraisal, sale, and payment were to constitute the sole basis for the passing of ownership. The right of the trustee to perform its duty was intended to be cut off. Its duty to protect, conserve, and safeguard the assets of the trust for the benefit of all its beneficiaries and its liability for loss thereof resulting from its failure to exercise reasonable care, prudence, and diligence were cast aside in favor of a summary binding sale for the very purpose of subverting the duty of the trustee and the rights of beneficiaries."

Now that the statute is declared constitutional we adopt and declare the above holding herein as the proper and only interpretation the statute could and should be given. A court cannot, under the guise of its powers of construc-

tion, rewrite a statute, supply omissions, or make other changes and this is particularly true where it appears, as here, that the matter was intentionally omitted. State ex rel. Belker v. Board of Educational Lands & Funds (dissenting opinion by Carter, J., supported by a majority of the court), on rehearing, *ante* p. 270, 175 N. W. 2d 63; Long v. Poulos, 234 Ala. 149, 174 So. 230; Seattle Assn. of Credit Men v. General Motors Acceptance Corp., 188 Wash. 635, 63 P. 2d 359; Appeal of Infants Welfare League Camp, 169 Pa. Super. 81, 82 A. 2d 296; Mitchell v. Mitchell, 312 Mass. 154, 43 N. E. 2d 783.

In Armstrong v. Board of Supervisors, 153 Neb. 858, 46 N. W. 2d 602, we said: "If the language of a statute is clear and unambiguous, courts will not by interpretation or construction usurp the function of the lawmaking body and give it a meaning *not* intended or *expressed by the Legislature.*" (Emphasis supplied.)

The statute is constitutional. Nothing could be clearer than its meaning and its mandatory requirement of sale at or above appraised value. All conditions of the statute have been complied with. As we see it, there is nothing left to argue about, and that is the way the Legislature intended it. The Legislature, and not this court (as the majority unsuccessfully opposed), specifies the protections to the trust. They were by: (1) An opening bid at full appraised value and (2) required sale of a 6-year lease on failure of bidding. §§ 72-257 and 72-258, R. S. Supp., 1967.

But even if we were driven by some procrustean (ruthless stretching or cutting to fit) frenzy to create an ambiguity or save the situation we could not, short of outright usurpation. An amendment was offered to the statute in question on the floor of the Legislature to give the

Board of Educational Lands and Funds the right to order a new sale and reject bids. Senator Harsh, in explaining his amendment, said: "* * * sometimes you do get a sale of land that is not to the best interests of all the people concerned and I think that we ought to have *a provision in there that the Board have the right to reject some bids.*" (Emphasis supplied.) (1965 Legislative floor debate, page 2902.)

The amendment was defeated 27 to 10. The discussion on the floor was about as revealing as the vote, indicating an absolute intention not to give the board any discretion in the matter. (See Legislative floor debate, page 2902 et seq.)

We point out further that this is not a judicial sale and the rules applicable thereto are not relevant. Again the statute provides no procedure for confirmation or review by the board. Again the Legislature specifically rejected such a procedure. The protections, such as they are, are *before* the sale, not after. The statute, section 72-258, R. S. Supp., 1967, says: "Such land shall be sold at public auction, * * * to the highest bidder. * * * Settlement shall be made by paying cash of not less than twenty per cent of the purchase *price at the time of sale* and the balance shall be payable in cash *within ninety days of the date of sale.*" (Emphasis supplied.)

The only thing to be done is for the buyer to pay "ninety days *after* the sale" and not "ninety days after confirmation." It therefore is indisputably clear that a completed sale took place on the fall of the hammer, and the statute being complied with, the appellees were entitled to a deed on payment and any further attempts to sell or review subsequent bids were not authorized by law, are void, and

may be enjoined.

The judgment of the district court enjoining the Board of Educational Lands and Funds from conducting a new sale is correct and is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The majority opinion here represents an obvious desire to decide the Belker case once more. See State ex rel. Belker v. State Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156, and on rehearing, *ante* p. 270, 175 N. W. 2d 63. The issues in the Belker case, however, were not and are not the real issues here.

The only real issues in this case are whether the State Board of Educational Lands and Funds has authority under any circumstances to accept a higher upset bid subsequent to a completed statutory sale of school lands, or set the prior sale aside; and second, whether any court having jurisdiction over the school lands trust has any authority to set aside a completed statutory sale of school lands under the factual circumstances partially disclosed by the majority opinion and additionally reflected in the dissent of Judge Smith.

Even if the Belker constitutional issue were critical, which it is not, the conclusion of the present majority on that issue rests upon a misinterpretation of the legislative action relied upon as justification. In both of the previous Belker opinions, the majority grounded the decisions on the assertion that because of legislative rejection of a proposed amendment to the bill, the resulting statutory silence on the issue must be interpreted as showing a clear

legislative intent that neither the board nor even a court, should have any authority "to reject or confirm bids," and demonstrated that the Legislature intended to "obstruct the trustee in the performance of its duty."

One of those opinions referred to the critical amendment as one "that would give the Board of Educational Lands and Funds the right to reject bids." The other opinion said that "in support of amendments," two Senators argued that the board "should have the right to reject bids."

The proposed amendment was to section 2 of L. B. 234, now section 72-257, R. S. Supp., 1967. The first sentence of that section read: "All lands, now owned or hereafter acquired by the state for educational purposes, shall be sold at the expiration of the present leases." The crucial amendment was to insert the words "when the best interest of the state will be served" after the word "sold" in that sentence. The actual amendment was a far-cry from what it was said to be by the Belker majority. The interpretation of the legislative rejection of that amendment as "plainly indicating that the Legislature did not intend that such board as trustee could see to it that the land did sell for its highest market price," is a truly remarkable interpretation of that legislative action.

A far more reasonable interpretation of that action, and the only one finding support in the legislative record, is that if the amendment had been adopted, it would have left the choice of whether to sell school lands or not entirely up to the board, and the board members had advised some members of the Legislature that they did not agree with the legislative mandate to sell all of the lands. See 1965 Legislative floor debate, p. 2902. It is far-fetched

indeed to ascribe to the rejection of the proposed amendment by the Legislative an intention to disregard the trust character of school lands, and to wipe out the obligation of the trustee of those lands to exercise the utmost good faith in the handling of the trust property. It is even more far-fetched to assume that it was intended to wipe out the right and duty of courts to supervise the trust for the benefit of the common schools.

The statutory silence and lack of specific authority for resale or setting a sale aside, in the opinion of the majority in the Belker cases, made the statute requiring the sale of school lands unconstitutional. The interpretation of that same statutory silence by the minority as leaving the existing trust law in operation, was referred to as judicial legislation. While a majority here were formerly quite willing to regard that legislative silence as speaking loudly for a particular and specific interpretation of legislative intention, any different interpretation of it is now referred to as being nothing less than "outright usurpation" of the legislative function. This is simply not true.

Turning now to the real issues in this case, we can find no logical nor legal reason why the decisions and rules governing contracts, trusts, and judicial sales should not be applied here to a statutory sale of school lands. This court long ago decided that the school lands of this state are held in trust for the benefit of the common schools; that the relationship of trustee and beneficiary is a fiduciary one imposing the utmost good faith in the handling of the trust property; and that the courts are charged with supervision of that trust regardless of who may be the trustee. We have also held that anyone dealing with the school lands must do so with knowledge of, and subject to, the trust obligation of the state. Propst v. Board of Edu-

cational Lands & Funds, 156 Neb. 226, 55 N. W. 2d 653, 346 U. S. 823, 74 S. Ct. 39, 98 L. Ed. 348. This law pertaining to the trust of lands for the benefit of the common schools grew out of the initial grant of the lands by the United States and its acceptance by the state. The law is judicial in origin, not statutory. It fills the void left by statutory silence and, in fact, is impervious to legislative overruling. Yet, it is from this area of judicial law, applicable specifically to the school lands involved here, that the majority wishes to abdicate in favor of an imagined interpretation of a silently expressed legislative intent.

As to judicial sales, the courts must act in the interest of fairness and prudence and with a due regard to the rights of all concerned and the stability of judicial sales. See, Siekert v. Soester, 144 Neb. 321, 13 N. W. 2d 139, 152 A. L. R. 527; Michelson v. Wagner, 170 Neb. 28, 101 N. W. 2d 498; Hull v. Hull, 183 Neb. 773, 164 N. W. 2d 455. These holdings also do not derive from any specific statute, but from judicial interpretation and decision. Certainly the obligation of courts as to a sale of trust assets by a trustee of a trust supervised by the court, is equally demanding, even though it also is not specifically required by any statute. As stated by the current majority in the dissenting opinon on rehearing in State ex rel. Belker v. State Board of Educational Lands & Funds, *ante* p. 270, 175 N. W. 2d 63: "Among the duties of a trustee is to require in the case of the sale of trust property that he shall obtain the highest price possible and refuse to make a sale if the sale was fraudulent, or the result of chilled bidding, or any other conduct or circumstance that resulted in an inadequate sale price."

In Rupe v. Oldenburg, 184 Neb. 229, 166 N. W. 2d 417, this court unanimously approved the setting aside of a

partition sale even after the sale had been initially confirmed by the court after a higher upset bid. The amount of the upset bid, made after confirmation, exceeded the initially confirmed bid by slightly more than 10 percent. There is no statute which spells out any authority of a court to set aside a judicial sale already completed and confirmed. Neither does any statute authorize an immediate resale to a higher subsequent bidder.

The subsequent bid to the Board of Educational Lands and Funds in this case exceeds the highest bid at the sale by a persentage virtually identical to the Rupe case. We can see no valid reason to reach a different result in this case. The only response to that conclusion in the majority opinion is the flat and unsupported statement that: "this is not a judicial sale and the rules applicable thereto are not relevant." Such authority is not enough to discard the law of judicial sales, much less the law of contracts and of trusts.

The action of the Board of Educational Lands and Funds in setting aside its prior sale and ordering a resale, upon receipt of a binding bid exceeding the sale price by more than 10 percent and accompanied by certified check and payment of costs of resale, should have been affirmed. The judgment of the trial court should be reversed.

Boslaugh, J., dissenting.

The Legislature authorized and directed the Board of Educational Lands and Funds to sell the school lands. It did not authorize the board to give them away.

The issue is quite simple. The question is whether a trustee should be compelled to sell an asset of the trust for less than its full value.

It is the duty of the board to obtain the highest price possible for the land. State ex rel. Reed v. Scott, 18 Neb. 597, 26 N. W. 386; State ex rel. Ebke v. Board of Educational Lands & Funds, 154 Neb. 244, 47 N. W. 2d 520. The purpose of the appraisal for sale purposes is to insure that the full value is received for the land. In this case the appraisal was far below the sale price and less than one-half the amount of the Buell upset bid. It is apparent that the appraisal was defective and that the land should be resold as the board contends.

In State ex rel. Belker v. State Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156, and on rehearing, *ante* p. 270, 175 N. W. 2d 63, it was pointed out that there is nothing in the act which in any way limits or attempts to limit the jurisdiction or power of the courts to determine whether a sale has been conducted in the manner required by law.

The majority opinion refers to the so-called Harsh-Budd amendment to L.B. 234 which proposed to insert the words "when the best interest of the state will be served" after the word "sold" as it now appears in section 72-257, R. S. Supp., 1967. The effect of the amendment, if it had been adopted, would have been to give the Board of Educational Lands and Funds an uncontrolled discretion as to whether any school lands should be sold. That is a far different matter than the right to refuse to complete a sale when it appears to the board that the land has been sold for less than its full value because of a defective appraisal.

The Legislature has the power to provide the method of administering the public school lands; but the method provided must be one which is within the law governing the administration of trust estates. State ex rel. Ebke

v. Board of Educational Lands & Funds, supra. The Legislature has not done otherwise. It is the court which has chosen to ignore the rules of law applicable to trust property and trustees acting in a fiduciary capacity.

In State ex rel. Reed v. Scott, *supra;* this court held that it would not interfere with the discretion of the board unless there had been an abuse of the trust. In this case the court has determined to interfere to compel what appears to be an abuse of the trust.

The problem created by the decision in this case, although of judicial origin, may nevertheless be remedied by legislative action. It is a matter to which the Legislature should address itself at the earliest opportunity.

Smith, J. dissenting.

The following facts are significant: The notice of sale stated: "No sale will be final until approved by the Board . . . and the Board reserves the right to reject any and all bids." The terms were read to both bidders who understood them. The auctioneer announced: "Sold, subject to approval by the Board of Educational Lands and Funds."

The statutory interpretations in the majority opinion, with which I do not concur, ought not to be determinative. The parties in actual fact did not intend the transaction to be a contract which the court finds. We can only conjecture as to the extent the board's procedure and the understanding of the bidders affected both appraisal and bidding.

Plaintiffs have invoked the extraordinary remedies of injunction and specific performance against the board. This unusual situation, even on the theory of the major-

ity opinion, ought to be governed by this rule: Sometimes "equity does not lay so ready or so vigorous a hand upon a public official board to compel specific performance as it does to enforce the contracts of private parties." Beeman v. Richardson, 108 Kan. 604, 196 P. 772 (1921). Plaintiff's suit is without equity. I respectfully dissent.

Newton, Jr., concurring.

I concur in the opinion of White, C. J., and reluctantly conclude that this court now has no other recourse.

The dissent of Smith, J., is based on the attempt by the Board to reserve "the right to reject any or all bids" and thus implement the statute in a manner specifically rejected by the Legislature as pointed out in the opinion of White, C. J. The dissent of McCown, J., falls in a similar category.

As made apparent in State ex rel. Belker v. Board of Educational Lands & Funds, 184 Neb. 621, 171 N. W. 2d 156, on rehearing, *ante* p. 270, 175 N. W. 2d 63, we have here a statute deliberately and purposely designed to prevent any possibility of review of school land sales. Because it infringed the right of judicial review of sales of trust property, a majority, though not controlling, of the members of this court found the statute to be unconstitutional. The controlling minority then insisted and now again insists that the right to judicial review can be read into the statue notwithstanding the clearly expressed legislative mandate and intent. This clearly entails amendment by judicial action and the exercise of a power not conferred upon this court. The controlling minority having succeeded in preventing a ruling that the statute was

unconstitutional, it must now be regarded as constitutional and enforced in accordance with the expressed command and intent of the Legislature. Rhetoric may confuse the issue, but the logic contained in the present majority opinion cannot be so readily confounded.

With the passage of sections 72-257 and 72-258, R. S. Supp., 1967, the Legislature made possible and in the case of State ex rel. Belker v. Board of Educational Lands & Funds, *supra*, this court sanctioned a situation permitting the greatest loss of public funds ever witnessed in this state. The fact that all parties acted in good faith does not serve to alleviate or lessen the prospective damage.

According to the June 30, 1968, report of the Board of Educational Lands and Funds, we have 1,611,499.19 acres of school lands in Nebraska, having an appraised value of $70,340,595, or about $43.65 per acre. With the constant inflationary rise in farmland values during the past 30 years, these figures on valuation appear to be inordinately low. This is verified by the sale of the tract now under consideration.

The present case serves to clarify and point up the existing situation and the amount of the prospective loss. The school lands have been most recently appraised at a value of $70,340,595. In this instance, one section of land was sold. This section was appraised at a supposed market value of $35,840. It was sold at auction for $66,560 and thereafter was subject to a bid of $73,225. It is evident that the appraised value was not representative of market value, yet under the law, the land would have had to have been sold for the appraised value of $35,840 had no further bid been received. This would be $37,385 less than the amount finally bid and also less than 50

percent of the final bid. If this is a fair example of what is to be expected from the forced sale of school lands under the existing statute, without discretionary action being vested in the Board of Educational Lands and Funds, the extent of the possible loss to the school fund becomes apparent. The possible loss, on the basis of percentages found in the present case, could amount to more than the total appraised value of $70,340,595. Thus far we have mentioned possibilities. That they would be fully realized is, of course, extremely unlikely. Nevertheless, where such extreme losses are theoretically possible, it is obvious that material or major losses will be sustained. Cases where a single bidder appears are certain to be found, as where chilled bidding is encountered, the land is surrounded by other land under one ownership, or an understanding is arrived at between prospective purchasers, and in other situations not conducive to free and open bidding.

The theory that appraisal can supplant the protection afforded by a post-sale scrutiny with a view to determining the fairness and adequacy of the sale is not tenable. This is recognized by the Legislature in other similar fields. For instance, in the sale of lands under foreclosure or belonging to a trust or decedent's estate, the Legislature requires a post-sale scrutiny and confirmation by the courts. Do lands held in trust by the state merit any less protection than those owned by private individuals or their estates? There can be but one answer. I find it impossible to believe that the Constitution of Nebraska sanctions such a position and adhere to the dissenting opinions appearing in the case of State ex rel. Belker v. Board of Educational Lands & Funds, *supra*.

Spencer, J., concurring.

I am in full agreement with the majority opinion herein, and join the concurrence of Newton, J. With reference to the dissenting opinion of McCown, J., I point out that the majority of the court pointed up this problem in suggesting the legislative act was unconstitutional.

With specific reference to the suggestion that the majority misinterpret the action of the Legislature on suggested amendments to L. B. 234, now section 72-257, R. S. Supp., 1967, I suggest that the legislative floor discussion leaves no doubt on that point. In substance, Senator Harsh said: I move the adoption of the amendment. I think every one of us is interested in the sale of these school lands and that the people, or particularly the children of Nebraska, get the best possible return from them. I think that's the purpose of the introducer in the sale of the property. He then said: "* * * sometimes you do get a sale of land that is not to the best interests of all the people concerned and I think that we ought to have a provision in here that the Board have the right to reject some bids."

The introducer of the bill, in response to Senator Harsh's opening statement, said in part: "Therefore, I feel that this legislature is the group, the one to make the decision and if the Board of Educational Lands and Funds apprasies these lands at the market price, we have already agreed in this legislature through our passing this over to Select File, advancing to E and R for review and so forth, that we feel that when you sell at market price, this is the thing to do, to sell and so I feel that if we give this Board of Educational Lands and Funds this privilege of evaluating this land, appraising the land, at the market value, then

it will be in the best interests of the state to sell the land so therefore I am opposed to this particular amendment."

Senator Harsh said in closing: "The only thing I have in closing, that I think this is just an effort to try to get as fair and as just a value as we can for the school investments of Nebraska. I'd like to call your attention that this is no different than we now have on the sale of these small tracts, they have a right to reject certain bids. And I think this is just protection and we could have and possibly get a little more money." It is evident to me that the Senator was trying to give the Board the right to reject any bid not in the best interest of the trust, and the Legislature rejected the idea and insisted that title should pass upon the close of the sale.

Newton, J., joins in this concurrence.